2687 and 2686

No. 12845

United States
Court of Appeals
for the Ninth Circuit.

THE STUART COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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Transcript of Record
In Two Volumes
Volume II
(Pages 401 to 666)

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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Mr. Mackay: We will call Mr. Royce.

Whereupon,

DONALD ROYCE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

The Witness: Donald Royce.

Mr. Mackay: Your Honor, before I examine this witness I should like to offer in evidence—I understand there is no objection from counsel—the statement showing comparative balance sheet per return dated 3-31-42, and also per books 10-31-42.

The Court: I thought we had something like that in evidence.

Mr. Mackay: I started to, your Honor. We held it back for further identification, and now we have gotten together and agreed upon it. We withdrew it in order to submit it to counsel for the other side, in order for him to see it.

The Court: Now, is there any objection to the last offer of comparative balance sheets per return for March 31, 1942, and per books for October 31, 1942? [380]

Mr. Maiden: There is no objection, your Honor.

The Court: It will be received in evidence as Exhibit No. 18.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 18.)

(Testimony of Donald Royce.)

Mr. Mackay: I should like to offer in evidence the summary of profit and loss for the period April 1, 1941, to March 31, 1942, and also covering the period from April 1, 1942, to October 31, 1942.

Mr. Maiden: There will be no objection, your Honor.

The Court: Without objection, it is received as Exhibit 19.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 19.)

Direct Examination

By Mr. Mackay:

Q. Mr. Royce, what is your occupation?

A. I am in the investment business.

Q. How long have you been in that business?

A. About 28 years.

Q. 38 years? A. 28.

Q. Oh, 28. What concern are you associated with now? A. William Staats Company.

Q. In what capacity? [381] A. President.

Q. How long has that company been in business?

A. 61 years.

Q. 61 years. It is an investment house, is it?

A. It is.

Q. Does your company underwrite securities?

A. They do.

Q. Have you ever had occasion to underwrite securities for some of the drug companies?

(Testimony of Donald Royce.)

A. We have been with underwriting groups which have underwritten securities for drug companies.

Q. Can you give the names of some that you have underwritten?

A. Squibb, Abbott Laboratories, Parke-Davis, and Merck. Now, I haven't necessarily been with the company at the time they have been in these underwriting groups, but with this company or other companies.

Q. Now, whom were you with before you were with the Staats Company?

A. I was with Blyth & Company.

Q. Isn't that an underwriting office?

A. That is a national firm, headquarters in New York—and with the National City Company of New York prior to that.

Q. What position did you hold with Blyth & Company?

A. Vice-president and director. [382]

Q. In your writing endeavors, do you make analyses of the companies' balance sheets and profit and loss statements and affairs before you underwrite them? A. We do.

Q. What was the general condition with respect to the markets, say, about November 28, 1942; just generally?

A. Oh, I would say within about 20 per cent of its—about 20 per cent of its low since the middle 30's. The industrial averages, as I recall, were around 115 at that time, whereas earlier that year,

(Testimony of Donald Royce.)

or late '41, they had gotten down to the 90's. Now, that compares with our 175 at the present time.

Q. Now, in analyzing the company's business, such as Squibbs and those that you have mentioned, for the purpose of underwriting, what importance does an investment house give or you give to trade-marks?

A. With respect to those companies, I wouldn't think that the trade-mark would enter into it.

Q. Why do you say that, Mr. Royce?

A. They are old established companies. You would go, based upon their earning record. I don't think I know of a trade-mark of any of those companies. It is not——

The Court: I can't quite hear you. I would like you to make an effort to lift your voice. You are talking down. You are talking a little too softly. Will you try to [383] speak up? Raise your head up.

The Witness: I will. In an ethical drug company there are not, as I remember them, a public acceptance of an individual item as there might be in a company that advertises and sells direct to the public, so that I do not recall any of the particular items. I am sure that if they were repeated to me, I might remember them, but I do not recall them at this time.

Q. (By Mr. Mackay): I show you Exhibits 18 and 19, and ask you if you have seen those before.

A. I saw them a few moments ago for the first time.

(Testimony of Donald Royce.)

Q. Well, had you discussed this situation and the facts in relation to the business before this time? A. I have not.

Q. Now, generally, with respect to——

A. I would like to make it clear. I have not discussed any of these financial sheets.

Q. Have you had general discussion with respect to the nature of the business of The Stuart Company?

A. Well, I have been sitting here for the last three or four hours.

Q. Yes.

A. I have known about The Stuart Company, yes, for, I would say, about a year. [384]

Q. Well, now, with respect to trade names generally, in your analyzing of accounts, what importance do they have in your underwriting?

A. These financial reports?

Q. Not these particularly; any financial report.

A. Well, I would say that they are paramount in beginning your study, that is, the first thing we would do would be to make a study.

Q. A little louder, please.

A. Would be to make a study of the balance sheet and then a very careful study of the earnings statements as far back as we could, as they were available. We would usually require three years earnings statements and would want ten years earnings statements before analyzing a company from the standpoint of an underwriting.

(Testimony of Donald Royce.)

The Court: You are talking about analyzing a company for what purpose?

The Witness: For the selling of stock to the public or to a private individual or a private corporation.

The Court: For the purpose of placing a value on the stock for sale?

The Witness: Yes.

The Court: Now, I thought the question was what consideration do you give to trade names when you analyze the financial reports of one of these companies for that purpose, [385] and I don't think you have answered that question.

The Witness: After analyzing the financial statements, there would be a regular series of things we would then consider. I would say the first considered after the financial statements, provided they were of such nature that a deal would seem to be possible, we would then study the industry in which that company operated, trying to see the type of industry it was, the future it had, and after that we would probably look at what we would call the intangibles. There would be a consideration of the management; if it is a merchandising operation, the type of sales organization, the type of sales program which they have. If it is purely merchandising, the ability of the company to obtain the merchandise which they are going to sell at a price, we will say, comparable to others in the industry. We would look at the size of the company in relation to the industry. We would look at any

(Testimony of Donald Royce.)

patents which they might have, any contracts they might have, or if there was something that put that company in a particularly favorable position due to some sort of a monopoly on the product they might be buying, or a favorable position in relation to others, those, I think, would be the intangibles, and in that group would be included the trade-mark, so it would be weighing—if we considered the trade-marks, it would be weighing their value in relation to the other intangibles and then trying to weigh what value to [386] place on the intangibles over the true balance sheet and earnings values.

I might explain it this way: If we would find a company would have a net worth, a true worth, of, we will say, $100,000.00, you would say that a company in that industry might be entitled to earn a certain percentage on its assets position. If it was earning a great deal more than it would be entitled to earn on that assets position, then that additional earning would be regarded as due to a large extent to the intangibles. Now, how you would measure those intangibles will vary with every company, but all of those intangibles that I mentioned before, I think, would have to be regarded in relation to the part that one played to the whole, and all of them would have to be regarded as to how much additional earnings they would contribute to that company over and above the amount that company would be entitled to earn on its investment.

Q. (By Mr. Mackay): Would you assign any value at all to those intangibles, particularly a

(Testimony of Donald Royce.)

trade name, if the company showed no earnings?

A. We would not.

Q. Will you please examine Exhibit 19. That shows a loss to The Stuart Company for its first full year of operation of $6,462.14, and a loss for the period from April 1, [387] 1942, to October 31, 1942, of $8,989.42.

A. Under those circumstances, I am very confident there would have been no value, from the standpoint of a public distribution or sale to a private group, of that trade-mark.

Q. The record shows that The Stuart Company had carried on operations and sold products under "the Stuart formula" trade name from the beginning at April 1, 1941, to November 28, 1942, which resulted in these losses that I have referred to on Exhibit 19. In your opinion would the trade-mark have any fair market value at that time?

A. I am very confident it would not have.

Mr. Mackay: You may take the witness.

Cross-Examination

By Mr. Maiden:

Q. Mr. Royce, are you assuming that The Stuart Company owned this trade-mark as of the dates of those balance sheets? A. Am I assuming——

Q. That, yes.

A. I don't—I wasn't assuming on it, it didn't make any difference to me.

Q. In other words, you simply don't put any value on that trade-mark?

(Testimony of Donald Royce.)

A. No, I would put no value on it because it had not produced anything in the way of earnings to that date. [388]

Q. Well, now, Mr. Royce, do you expect a newly organized corporation entering into an industry to make profits the first year or two?

A. Some companies will, and unless they have, I would say it would be very difficult to consider selling that company either publicly or privately at any considerable value.

Q. Well, but simply because a newly organized business didn't show a profit the first year or the first two years, doesn't necessarily mean that the company has no future prospects that would give some value to its stock?

A. In most instances it would mean that you could not realize the value at that time on it unless there is some very unusual circumstance where the company—you can see—is in an industry or has a position or has a monopoly or has a patent that almost assures them, with only reasonable management, of being successful.

Q. Would you say that that trade-mark or an intangible asset might be considered to be valuable property to the person who owned it and was using it in the operation of his business, whereas to some person who was not in the business at the time it would have no value?

A. In this type of a company I don't believe so, because I don't believe it is the trade-mark that produces the business and the profits.

(Testimony of Donald Royce.)

Q. Well, in other words, Mr. Royce, is it your testimony [389] that trade-marks actually don't produce income and have no value?

A. No, no, I didn't say that; I don't say that trade-marks have no value. I say, until they have proven that, due to that trade-mark and in spite of management or anything else, primarily due to that trade-mark they will carry on and produce profits, then I say I do not believe they have much value. I think the Coca-Cola trade-mark has a big value.

Q. Well, now, how long will you allow a newly organized corporation to show a loss before you will write that corporation off so far as investment purposes are concerned, from your standpoint?

A. It is not a question of time, it is a question of progress and position and their position in an industry. I don't think you can measure it in time, I really don't. I can tell you of companies that haven't shown a profit for a number of years, that are very valuable. I would say on this company—if you want my explanation—it would simply be comparing it with the industry, and that is why I say in this particular instance I don't think there would have been any value from the standpoint of the investment banker.

Q. Just from that standpoint of the investment banker, that is the standpoint you are speaking about?

A. That is the only thing I am talking about.

(Testimony of Donald Royce.)

Mr. Maiden: From the standpoint of the investment [390] banker. I believe that is all.

Mr. Mackay: That is all, if the Court please. May the witness be excused?

Mr. Maiden: He may be excused.

The Court: Yes, he may be excused.

(Witness excused.)

Mr. Mackay: Your Honor, at this time I am very happy to announce, if your Honor please, that Petitioner rests.

Mr. Maiden: Well, I am proud to hear that, Brother Mackay.

Mr. Mackay: Thank you. I will try to be less long on my cross-examination than you.

Mr. Maiden: I would appreciate it if we could have a five-minute recess before starting my case.

The Court: Very well, we will recess at this time.

(Short recess taken.)

The Court: You may proceed.

Mr. Mackay: If your Honor please, in my desire to close the case, I overlooked the fact that Exhibit 16, which had been marked for identification, was not received in evidence, that being a complaint which Mr. Robert Dunlap had identified and which had been drawn up by him. Your Honor, at the time I offered it I had not established that Mr. Hanisch had approved it, and I would like the privilege of asking Mr. Hanisch that question. [391]

Will you take the stand, Mr. Hanisch?

Whereupon,

ARTHUR HANISCH

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Mackay:

Q. Mr. Hanisch, you have been sworn. I will ask you to examine here Petitioner's Exhibit 16 which has been marked for identification, and which Mr. Dunlap identified—you heard him testify—as a complaint that he drew up and was ready to file against the corporation.

Now, I will ask you if you approved that document. A. I did.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

Mr. Maiden: There will be no objection, if the Court please.

The Court: It is received as Exhibit 16.

(The document heretofore marked Petitioner's Exhibit No. 16 was received in evidence.)

Mr. Mackay: That is all. [392]

Cross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, I will ask you if you can

(Testimony of Arthur Hanisch.)

identify this (indicating) as a booklet put out by The Stuart Company.

A. It is a booklet put out by The Stuart Company. I don't mean at the present time. We have discontinued its use.

Q. I believe the booklet shows that—"Copyright 1943, The Stuart Company."

A. That is what it looks like to me. I haven't got my reading glasses.

Q. Now, I have reference to page 4 of this little booklet, down at the bottom of the page where a paragraph is encircled with red pencil. Would you read that, please?

A. (Reading.)

> "The scientific process which produces The Stuart Formula is a result of over 12 years research by eminent biochemists at one of the nation's leading laboratories."

Q. To whom did you refer there?

A. California Institute of Technology.

Q. Dr. Borsook and his associates at the California Institute of Technology by name?

A. No, the names are not in the book.

Mr. Maiden: I would like to offer this in evidence.

Mr. Mackay: No objection. [393]

The Court: It is received as Exhibit Q.

> (The document above referred to was received in evidence and marked Respondent's Exhibit Q.)

(Testimony of Arthur Hanisch.)

The Court: Now, let me just say that, before we go on to Respondent's case, we had better take care of Exhibit 13 for identification, the opinion of Miller & Hazard.

Mr. Mackay: Well, if your Honor please, I recognize counsel's objection to it, and I will withdraw my offer.

(The document heretofore marked Petitioner's Exhibit No. 13 was withdrawn.)

Q. (By Mr. Maiden): Now, Mr. Hanisch, I would like for you to identify that letter (indicating), if you can, from the American Medical Association to The Stuart Company.

Mr. Mackay: What date?

Mr. Maiden: This is dated April 24, 1942.

The Witness: I don't recall this letter. It unundoubtedly was sent to The Stuart Company, Pasadena, according to the address, but I don't recall it.

Q. (By Mr. Maiden): I will ask you if you can identify what purports to be a copy of a letter from The Stuart Company, addressed to Dr. Franklin C. Bing, secretary of the Council on Foods and Nutrition, American Medical Association, as being in answer to this letter from the Medical Association of April 24, 1942. [394]

Take your time, enough to satisfy yourself.

A. Shall I answer that question?

Q. Yes.

A. I recall the circumstances of this letter and

(Testimony of Arthur Hanisch.)

other letters of the same type where we received inquiries regarding the technical nature of the product, and this was an inquiry from the American Medical Association who had undoubtedly had doctors ask them what was the nature of The Stuart Formula. Then the American Medical Association will write the company involved and ask for a technical description of the product. It was our policy, and it was a special policy in agreement with Mr. Lewis and Dr. Borsook, that any matter of that type had to be referred to him. You will notice there is no initialing at the bottom of the letter. I recall the circumstances, that Mr. Lauerhass took that letter to probably both Mr. Lewis and Dr. Borsook—in any event, one of them—and this letter was written by them.

Mr. Maiden: I would like to offer this in evidence as Respondent's exhibit next in order.

Q. (By Mr. Maiden): While counsel are considering that exhibit——

Mr. Mackay: There is no objection to that.

The Court: No, no; let's just take one exhibit at a time. There is something like a parliamentary rule that when you have one motion before the house you can't have a [395] second motion before the house.

Mr. Mackay: There is no objection to those two letters.

Mr. Maiden: Let the letter of April 24, 1942, go in evidence as Respondent's Exhibit R.

(Testimony of Arthur Hanisch.)

The Court: Now, let me see that letter just a minute.

Mr. Maiden: That is the letter from the American Medical Association.

The Court: There is no objection to the American Medical Association letter?

Mr. Mackay: None at all.

The Court: That is received as Exhibit R.

(The document above referred to was received in evidence and marked Respondent's Exhibit R.)

Mr. Maiden: Now, I would like to offer in evidence the letter of The Stuart Company, dated June 15, 1942, to Dr. Franklin C. Bing, in answer to the American Medical Association letter.

The Court: Now, the testimony is that this was written by The Vita-Food Company but it was sent over the name of The Stuart Company, is that right?

The Witness: Your Honor, that isn't quite what I said, no.

The Court: What do you mean? Let's see [396] whose letter that is supposed to be.

The Witness: That is a letter signed by The Stuart Company. We, having no technical men in our organization at that time, had a verbal agreement with Dr. Borsook and Mr. Lewis that whenever that type of problem came up where we had to answer a technical situation, particularly a situation as important as the American Medical Association, that we had to let them supply that

(Testimony of Arthur Hanisch.)

information. It was written on our stationery, but the information was supplied by either Mr. Lewis or Dr. Borsook, or both. That was our general policy.

Mr. Maiden: Then, from that information you prepared the particular letter we are considering?

The Witness: I don't know whether the letter was actually dictated in our office or in Dr. Borsook's office or where it was dictated.

Mr. Mackay: No objection.

The Court: That is received in evidence as Exhibit S.

(The document above referred to was received in evidence and marked Respondent's Exhibit S.)

Mr. Mackay: I have one question.

Redirect Examination

By Mr. Mackay:

Q. I want to call your attention to this little booklet which I think is Respondent's Exhibit Q, and call your attention to the last paragraph: "The scientific process which [397] produced The Stuart Formula is the result of over 12 years of research by eminent biochemists at one of the nation's leading laboratories."

Now, I will ask you if you understood the question counsel asked you with respect to that?

A. Whether I understood it——

Q. Counsel's question as to whom you referred

(Testimony of Arthur Hanisch.)

to when you said, "one of the nation's leading laboratories"—has been developed after 12 years' experience.

A. No, I did not. I must refer to the date. This is 1943, and I had a complete misconception of your question. I assumed when I answered the question that this was a booklet that we had out before our cancellation agreement.

Q. What does that refer to—"the nation's leading laboratories"?

A. This refers to the William T. Thompson laboratory.

Mr. Mackay: That is all.

Recross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, isn't it a fact that the William T. Thompson Company and The Stuart Company were cited by the Food and Drug Administration for mislabeling products put out by The Stuart Company and manufactured by the William T. Thompson Company?

Mr. Mackay: Just a moment. Your Honor, I object to [398] that as entirely beyond the field of cross-examination. That was not gone into at all, and this relates to a period, anyway, subsequent to the time involved. I suggest it is entirely incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Mr. Maiden: That is all, if the Court please.

(Witness excused.)

Mr. Mackay: Now, if your Honor please, I have given further consideration to the attorney's opinion, the patent attorney's opinion. I think, if your Honor please, in view of the fact that the question in this case is as to the intent of the parties here and what led them to enter into the contract of November 28, 1942, that the opinion is proper evidence and therefore I renew my offer again for the limited purpose which I have already explained.

The Court: I think you have it marked as Exhibit 13, do you not?

Mr. Mackay: I think it is marked as Exhibit 13 for identification, the Hazard & Miller opinion.

The Court: Off the record.

(Discussion off the record.)

The Court: Back on the record.

Now, Mr. Mackay, it is a while back since you have stated the purpose of the offer which you state is for a limited purpose, and I would like to see that proposed exhibit [399] for just a minute. This is, as I understand it, Mr. Mackay—and you can check with me on this—this is in the nature of a memorandum setting forth the legal opinion of Hazard & Miller, attorneys and counselors in patent causes, written on their letterhead, dated November 17, 1942, and it covers 14 pages.

Is it correct that this represents an opinion in memorandum form by that law firm?

Mr. Mackay: Yes, your Honor.

The Court: It is signed by Fred Miller. Who is Fred Miller?

Mr. Mackay: He was one of the members of the law partnership. He was a patent attorney hired by The Stuart Company to write that opinion.

The Court: Now, does the record show that The Stuart Company requested this opinion?

Mr. Mackay: Yes, your Honor, Mr. Robert Dunlap so testified—Mr. Hanisch.

The Court: Does the record show when the opinion was requested? This is dated November 17th, and the settlement agreement which is Exhibit 12 is dated November 28th. Now, does the record show at what time this opinion was requested? It takes a little time to prepare these, Mr. Mackay.

Mr. Mackay: I don't think it does, but I think Mr. Dunlap could tell you that. [400]

The Court: I will ask you that, Mr. Dunlap.

Mr. Dunlap: May I refer to my diary, your Honor? I want to give the exact date if I can.

September 29th, your Honor.

The Court: What year?

Mr. Dunlap: 1942.

The Court: I think maybe it would be well if you resume the stand. I may want to ask you a few questions about this.

Whereupon,

ROBERT H. DUNLAP

recalled as a witness for and on behalf of the Peti-

(Testimony of Robert H. Dunlap.)

tioner, having been previously duly sworn, was examined and testified further as follows:

The Court: Now will you state the limited purpose of your offer, Mr. Mackay?

Mr. Mackay: My purpose, if your Honor please, is to show that The Stuart Company obtained an opinion regarding the ownership and the proper registration of the trade name, "the Stuart formula," and that this opinion has a bearing, and it is offered only for that purpose of showing what was in their minds at the time they entered into the agreement of settlement of November 28, 1942.

The Court: Now may I ask the witness a few questions? [401]

Mr. Mackay: Yes.

Direct Examination

By the Court:

Q. I would like you to look at Exhibit 13, Mr. Dunlap. This is in the nature really of a foundation for the receipt of the exhibit if it should be received. At least, it is in my opinion necessary to have a little bit more information about the nature of that memorandum and how it was regarded by The Stuart Company.

Did you request that opinion or did Mr. Hanisch request it upon your advice?

A. I recommended that we have counsel take a look at the trade-mark situation and find out what the rights of the parties were.

(Testimony of Robert H. Dunlap.)

Q. As a matter of what law, federal law or state law?

A. As a matter of federal law, and also state law.

Q. Now, does that opinion relate to the rules of law that would be applicable under federal law or state law?

A. Primarily federal law, your Honor.

Q. Does the opinion set forth any law itself?

A. Yes, the statute is quoted and also numerous decisions are quoted from.

Q. That is the 1920 federal law?

A. That is correct.

Q. It has been referred to as the 1920 statute. How [402] is that statute known?

A. The Act was known as the 1920 trade-mark law. It differs from the 1905 law because——

Q. All right, that is all right.

A. Pardon me.

Q. Now, the cases that are cited there, are they federal decisions?

A. I think there are some state cases also.

Q. You are a lawyer, of course?

A. Yes, indeed.

Q. Is that drafted in the form of a legal opinion? A. It is, with supporting citations.

Q. To what extent is The Vita-Food Corporation or The Stuart Company mentioned in the opinion, the memorandum?

A. Well, the contract refers to the title of—for instance, just for illustration, here on page 13: "In-

(Testimony of Robert H. Dunlap.)

sofar as the contract of May 5, 1941, purports to vest title in Vita-Foods, it is a nullity."

Q. Then, the opinion undertakes to pass upon the validity or lack of validity of some clause of the agreement of May 5, 1941?

A. Yes, your Honor.

Q. Now, you must have put a question to counsel when you asked them to prepare that opinion. Do you remember what question you put to them? Do they set it forth there? Do [403] they say, "In answer to your questions," or anything of that kind?

A. Yes, your Honor. The first paragraph says, "You have requested my opinion as to whether United States Trade-Mark No."—blank—"issued September 8, 1942, to The Vita-Food Corporation, would be subject to cancellation on the petition of The Stuart Company."

That was the question which was answered in this opinion.

Q. Cancellation by the Patent Office or the Commissioner of Patents in Washington?

A. Commissioner of Patents, yes, your Honor.

Q. So that, in your opinion, is that memorandum clear with respect to what questions counsel were advising you upon?

A. Yes, your Honor. I would like to say this: I had several other discussions with Mr. Miller in which opinions were given on related questions, but this written opinion has to do only with that one phase of the question.

(Testimony of Robert H. Dunlap.)

Q. Now, when you received that opinion on or about November 17, 1942, what was the status of the controversy? I recall that the Complaint had been filed in the Superior Court by The Vita-Food Company.

A. That is not correct, your Honor. The complaint was filed eight days later. The status of the dispute was this: I had made an appointment to meet Mr. Wiseman in Mr. Miller's office. I did meet him at that time, and at that time I [404] received his opinion.

Q. Did you keep your appointment, did you go to see Mr. Wiseman? A. Oh, yes.

Q. Did you have the opinion with you when you went to see him?

A. He met me at Mr. Miller's office, and I got the opinion there.

Q. Well, what I am getting at is, did you discuss this problem with Mr. Wiseman and tell him in your discussion that you had received the opinion, or did you get the opinion after you had parted that day?

A. No, I had the opinion and I told him that we were certain that the trade-mark registration wasn't worth the paper that it was written on and we were the owners of the trade-mark "the Stuart formula."

Q. Did you tell him that you had gotten that opinion from Hazard & Miller? A. I did.

Q. Did he see it?

A. That I don't recall, your Honor.

Q. Did you show it to him?

(Testimony of Robert H. Dunlap.)

A. I can't recall that. I don't think I did.

Q. Did he have a conference with you in the Miller offices with Mr. Miller? [405] A. No.

Q. You say you met him at Miller's office?

A. As a matter of convenience to me.

Q. You just met there?

A. That is correct.

Q. You didn't have a conference there?

A. We sat around. I think we talked about 20 minutes in his office, yes.

Q. In whose office?

A. I think—my recollection is, your Honor, that we used one of the offices in the Hazard & Miller suite.

Q. Well, just to talk between yourselves?

A. That is right. I may have introduced Mr. Wiseman to Mr. Miller; I don't recall.

Q. Then, it was after that that they filed their complaint? A. That is right.

Q. So that, before they filed their complaint, you had told them that you had serious doubts whether their registration of that trade-mark was any good?

A. I went stronger than that. I said the registration was no good.

Q. You told them that before they filed their complaint? A. I did.

The Court: So, as I understand it, Mr. Mackay, you [406] offer Exhibit 13 to show that, upon asking for this advice, The Stuart Company received the advice as stated in this memorandum from Fred Miller, and that it was their understanding that the

(Testimony of Robert H. Dunlap.)

federal law was as stated in this memorandum?

Mr. Mackay: Yes, your Honor, that is the purpose.

The Court: Then, we have to take into consideration that they had given certain facts to Mr. Miller, and, of course, we don't know exactly what the facts are that they told Mr. Miller.

Mr. Mackay: That is quite right.

The Witness: Pardon me, your Honor. The letter states what facts.

The Court: Then, the letter states the facts upon which the opinion was based?

Mr. Mackay: Yes, your Honor.

The Court: Then, in that respect the memorandum is a complete memorandum. It states the proposition, states the lawyer's understanding of the facts, and states his analysis of the statute and the authorities that he is relying upon.

The Witness: That is right.

The Court: Is there anything else that you think Mr. Dunlap should be asked about this exhibit?

Mr. Mackay: No, I think that is all.

The Court: Now, Mr. Maiden, if you want to renew your objection—do you want to ask Mr. Dunlap some questions [407] about this?

Mr. Maiden: No; I think your Honor has covered all of the questions that might be asked on that exhibit.

I submit, if the Court please, that the exhibit is incompetent for the reasons that I previously

(Testimony of Robert H. Dunlap.)

stated, that it in effect permits testimony in this case of a person without my being permitted to cross-examine him.

The Court: Now, is it really true that this memorandum is a memorandum of any testimony that anyone would give? You and I are acquainted with legal memoranda, and if that is received in evidence, Mr. Maiden, it seems to me that you would have an opportunity on brief, if you wanted to, to attack the soundness of the legal propositions set forth in that memorandum. That is a legal memorandum. The case law is given, the statute is given, the conclusions of the attorney who prepared it are set forth, but he gives the legal authority upon which he bases his opinion.

Now, his client relied upon his opinion, it was a professional opinion, and I don't think a legal opinion reduced to writing is in the nature of testimony. I don't know how you could cross-examine a lawyer on his legal opinion unless you brought in some law books to challenge the propriety of his legal analysis and the validity and soundness and appropriateness of his citations.

Mr. Maiden: May it please the Court, the proper way, [408] as I see it, to present this opinion or memorandum in evidence would be to put on the stand Mr. Miller and let Mr. Miller state that he prepared this memorandum, so that the Respondent would have an opportunity to cross-examine him on it, to see just what facts he assumed to be facts.

The Court: Well, now, do you object to that

(Testimony of Robert H. Dunlap.)

document on the basis of lack of proper identification?

Mr. Maiden: No, your Honor, I object to it upon the ground of incompetency.

The Court: So you don't question his signature or that it was prepared by Mr. Miller?

Mr. Maiden: No; Mr. Mackay wouldn't present anything that wasn't correct.

Mr. Mackay: Thank you.

The Court: But you object to it on the basis of incompetency?

Mr. Maiden: Yes, your Honor.

The Court: Now, my ruling is this: The document has been offered for the limited purpose of showing, (1) what advice was given to The Stuart Company by Mr. Fred Miller, and (2) what the understanding of The Stuart Company was on the matter of whether there could exist any doubt about the legal ownership by The Vita-Food Corporation of this trade-mark; and for that limited purpose it seems to me that this is not objectionable. It appears from the evidence that we have [409] up to this point that there arose doubt in the minds of Mr. Dunlap and Mr. Hanisch about the previous understanding they had had, that the trade name "the Stuart formula" was as a matter of law, owned by The Vita-Food corporation, and because of that doubt a legal opinion was requested, and then, on the basis of that legal opinion, The Stuart Company and its management came to believe that The Vita-Food Corporation really did not own that trade

(Testimony of Robert H. Dunlap.)

name and that there had been a misconception and misunderstanding up to a certain time about that point as a matter of law, and it is to be inferred from the record that we have so far that The Vita-Food Corporation did not agree with Mr. Dunlap and Mr. Hanisch.

As a matter of fact, I think we might ask you that. Did Mr. Wiseman or Mr. Lewis agree with you that they had no interest in that trade name?

The Witness: They did not.

The Court: Well, over the objection of Respondent, this is received as Exhibit 13.

(The document heretofore marked Petitioner's Exhibit No. 13 was received in evidence.)

Mr. Maiden: Your Honor, it is no longer necessary to note exceptions, is it?

The Court: Well, you may note them if you wish.

Mr. Maiden: I desire to note an exception to your Honor's ruling. [410]

The Court: I might observe that if you want to ask Mr. Miller to testify, you still have an opportunity to, because I understand this trial will continue tomorrow, and, as I have pointed out before, if you want to question the soundness of his legal opinion, you may do so in your brief.

Mr. Maiden: Well, your Honor, I have no fear of that exhibit because the issue in this case is not who had the title, but whether or not The Stuart Company acquired from Vita-Food Corporation whatever right Vita-Food Corporation had in and

(Testimony of Robert H. Dunlap.)

to the trade-mark. Of course, it is our contention that The Vita-Food Corporation did in fact and in law own the trade-mark.

The Court: Of course, you would argue in your brief, I expect, that Vita-Food Corporation as a matter of law owned the trade name, and so, as you probably will make that argument in your brief and it will have to be answered by Petitioner in his brief, it seems to me that this memorandum is really properly in the record, because it shows the opinion of an attorney who, I think we will all have to agree, is recognized here in Los Angeles as being competent to give that opinion. Now, to that extent, Mr. Dunlap, I think we should ask you who Mr. Fred Miller is, for the record in this case.

The Witness: He is a patent attorney in the City of Los Angeles, specializing in patent and trade-mark cases.

The Court: How long has he practiced [411] here?

The Witness: Since about 1928—'27 or '28, your Honor.

The Court: Do you know anything about his reputation?

The Witness: Yes, he is regarded among the first five or six able patent attorneys in this city.

The Court: Is there any doubt about that, Mr. Maiden?

Mr. Maiden: No. I have never heard of Mr. Miller, if the Court please, but I am not very widely

(Testimony of Robert H. Dunlap.)

acquainted here in Los Angeles. I assume Mr. Miller is a competent attorney.

The Court: Well, now, if there is any doubt about that—the opinion of Mr. Miller has been received in evidence—if Respondent has any doubt about whether he is a competent lawyer, I think you should call him and at least ask him something about his qualifications. If you can find any flaws with his opinion when you go into your research, why, you will have an opportunity in your brief to point out whatever flaws you find.

Mr. Maiden: As I analyze the case, if the Court please, I don't consider that that opinion is really relevant and material to the crucial issue that the Court is asked to decide in this case for this reason: If this agreement of November 28, 1942, was for the purpose of protecting and/or clearing title to this trade-mark as being the property of [412] The Stuart Company, then clearly the consideration paid to The Vita-Food Corporation by The Stuart Company would not be a deductible expense.

The Court: Is there anything further on this point?

Mr. Maiden: I wanted to ask a couple of questions, if your Honor please.

The Court: Proceed.

Mr. Maiden: Did you get any other opinion relative to this matter, Mr. Dunlap?

The Witness: We did.

Mr. Maiden: Where is that opinion?

The Witness: I thought I had it here, but apparently I don't, counsel.

(Testimony of Robert H. Dunlap.)

Mr. Maiden: If the Court please, I would like to make the request at this time of Mr. Dunlap that he obtain the opinion that he received from some other lawyer.

The Witness: I will be glad to.

Mr. Maiden: So that it may likewise go in evidence in this case before it is closed.

The Witness: I will be glad to.

Mr. Maiden: Mr. Dunlap, what was the opinion given by the other lawyer?

The Witness: It disagreed with Mr. Miller—initially.

Mr. Maiden: Well, you bring that opinion [413] in.

The Witness: Certainly.

Mr. Maiden: That is all.

Mr. Mackay: Now, you say he disagreed initially. What was his final opinion?

The Witness: I have letters on that.

Mr. Mackay: That is all.

We rest, your Honor.

Mr. Maiden: Call Mr. Oscar Wiseman to the stand, please.

Whereupon,

OSCAR WISEMAN

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

(Testimony of Oscar Wiseman.)

The Witness: Oscar Wiseman.

Direct Examination

The Witness: Your Honor, may I state one little thing in the interest of saving time?

The Court: I don't know whether this is proper or not.

Mr. Maiden, what is the trouble here?

Mr. Maiden: Well, I don't know.

The Court: You speak to your counsel about that.

The Witness: I want to clear up—— [414]

The Court: Would you mind stepping down from the stand? You are so close to me that I can hear you.

We will recess for a few minutes.

(Short recess taken.)

The Court: Proceed, gentlemen.

Mr. Maiden: If the Court please, I would like the record to show before the examination of Mr. Wiseman that Mr. Wiseman has the full consent and approval of The Vita-Food Corporation and Mr. M. H. Lewis to testify in this case with respect to these negotiations, and they gave him full approval to make any disclosures it is necessary for him to make.

Mr. Mackay: Well, we assumed that that would be so when you put him on the stand as a witness.

Q. (By Mr. Maiden): Mr. Wiseman, what is your present occupation?

A. Attorney at law.

(Testimony of Oscar Wiseman.)

Q. How long have you been an attorney at law?

A. Fifteen years plus.

Q. Where have you practiced?

A. In Los Angeles, California.

Q. Have you practiced in any particular field of law?

A. Well, my practice has been general. I have done considerable corporation work and considerable trade-mark work.

Q. Mr. Wiseman, at the inception of The Vita-Food Corporation were you an officer of that corporation? [415]

A. At the inception, no. I had no connection with The Vita-Food Coorporation until the summer of 1941. I didn't know about this May 5, 1941, contract, had nothing to do with it or any of the negotiations of the parties at that time.

My duties came into being in the summer of 1941.

Q. In what connection did you first become connected with The Vita-Food Corporation?

A. Well, as I recall it, the first matter I handled for Vita-Food was a trade-mark infringement case against—it was the Rice or the Boyle Laboratories. They were copying a label.

Q. What label were they copying?

A. I believe it was "the Stuart formula" label.

Q. What was the result of that litigation?

A. Well, there was no litigation on it. The products were sold—one, I think, was sold through Sontag Drug Stores, locally and one through Thrifty Drug Stores locally, and in both cases I was

(Testimony of Oscar Wiseman.)

able to obtain cease-and-desist agreements in writing, and rather soon.

Q. Who paid you for the services rendered in that connection?

A. The Vita-Food Corporation.

Q. To your knowledge did The Vita-Food Corporation pay for all of the expenses in that connection? A. Yes. [416]

Q. Now, Mr. Wiseman, were you ever at any time an official of The Vita-Food Corporation?

A. Yes, I became a vice-president of the corporation the latter part of 1941.

Q. Did you become Vita-Food's regularly employed attorney likewise?

A. I was on a retainer agreement and I was their principal counsel from the fall of 1941 until the summer of 1943.

Q. Do you now have any connection with The Vita-Food Corporation, either as an official of the company or as an attorney for the company?

A. No.

Q. How long has it been since you have had any connection with the company, of any kind?

A. Well, in a legal capacity I have had no connection with the company whatsoever since August of 1943.

Q. In an official capacity as an officer?

A. Or in an official capacity. I resigned as vice-president and I resigned as counsel in August of 1943.

Q. There has been no connection since then?

(Testimony of Oscar Wiseman.)

A. No—there were some business dealings, but they were at arm's length and had nothing to do with any services for them.

Q. Now, Mr. Wiseman, will you tell the Court when you first became aware of any claim by The Stuart Company that it [417] had any right or interest in and to this trade-mark?

A. November 18, 1942, when in a meeting I had with Mr. Dunlap at the office of Hazard & Miller he mentioned something about it.

Q. Well, do you recall in substance what he said?

A. I think so.

Q. Would you please tell us, briefly?

A. Well, Mr. Dunlap and I met in that office at his request to discuss the notice of cancellation which I had signed and given to them approximately on October 8, 1942. He asked me why we had limited it to, I believe it was, paragraph 6 or 7, having to do with their exclusive agency, and I told him that the reason we did that was to make it as easy as possible on them. In connection with that, he raised the point that he felt that they could, if they wanted to, claim the ownership of the trade-mark. I asked him upon what basis, and he told me that he had gotten an opinion from a San Francisco firm of attorneys and that he thought they could contest it.

I told him that that was utter nonsense, that they could not by any possible stretch of the imagination assert any claim to the trade-mark, and I told him my reasons. I opened my briefcase and I showed

(Testimony of Oscar Wiseman.)

him a photostatic copy of the registration of the trade-mark, "the Stuart formula." I showed him a photostatic copy of the federal registration of the mark, and [418] then I took out of my briefcase the May 5th contract and showed him the paragraph which recited that it was our property, and I told him this: I said, "In view of the record title that we have, in view of the fact that your company has estopped itself by an agreement that it signed in May of 1941, it is utterly ridiculous that you should make any claim whatsoever to this trade-mark, and there will be no discussion and I will not participate in any discussion for settlement or otherwise if such claims are asserted. If you want to talk on a sensible basis, we will discuss this case, but not on the basis that you have any claims to this trade-mark."

Q. Was anything said at that time about The Stuart Company purchasing the trade-mark?

A. Yes.

Q. Would you tell the Court just what occurred in that connection?

A. Well, that came up secondarily. Mr. Dunlap's first offer was to buy The Vita-Food Company, its plant and all its facilities, and I believe his offer was $15,000.00.

I told him we weren't interested in that, and I told him that if that was the type of offer he had in mind, that we really did not have anything to discuss further and that he could stand on whatever

(Testimony of Oscar Wiseman.)

they thought their legal rights were and we would do the same.

Q. What did you understand from that first conference [419] that The Stuart Company was really interested in obtaining from The Vita-Food Corporation?

Mr. Mackay: Just a moment. If your Honor please, may I have that question?

The Court: Will you read the question?

(The question was read.)

Mr. Mackay: If your Honor please, the witness has already testified that there was an offer there to buy the business. I think the question is improper.

Mr. Maiden: Well, if the Court please, he, Mr. Wiseman, was there, and he can tell the Court what in his opinion, from the nature of the discussion, he conceived to be the thing that The Stuart Company really wanted to obtain from The Vita-Food Corporation.

Mr. Mackay: I think if it were limited to the substance of the conversation there wouldn't be any objection. I object to that as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Maiden: I was simply trying to go to the intention of the parties, if the Court please.

The Court: Well, the Vita-Food Corporation had taken the first step and served the notice of cancellation, and your question has in it a conclusion. If you want to develop the facts from the

(Testimony of Oscar Wiseman.)

other side, that is all right, but I think the question was an improper question. [420]

Mr. Maiden: Very well, your Honor.

Q. (By Mr. Maiden): Mr. Wiseman, this first meeting was on November 18, 1942, is that correct?

A. November 18, 1942.

Q. That was after the issuance of the notices by both parties? A. Yes.

Q. Tell the Court whether or not the discussion turned around the claim of The Stuart Company that its——

The Court: It is a leading question, Mr. Maiden. Why don't you ask him what the subject-matter of the discussion was?

Q. (By Mr. Maiden): Will you tell the Court everything that happened with respect to the trade-mark at that first meeting?

The Court: What do you want to do? Do you want to center this testimony just on one thing, or do you want this witness to testify about what happened?

Mr. Maiden: Well, your Honor, I want the witness to tell what took place at this first conference with respect to the trade-mark. That is the one thing I am interested in in the case.

The Court: Well, Mr. Mackay, have you any objection to that question? [421]

Mr. Mackay: Yes, I think the question is too broad. He says, tell everything you know and take a lot of time. I think Mr. Wiseman would take a lot of time to tell us that. I object to it for that reason.

(Testimony of Oscar Wiseman.)

The Court: Well, Mr. Mackay, it seems to me in the presentation of your case you covered about everything that happened from the entering into a contract to resell the product up to the termination of the contract. Now, there are always two sides to a story. There are always two sides to a question.

Mr. Mackay: Yes, your Honor.

The Court: The theory of the Petitioner and the theory of the Respondent are quite far apart. Now, if the Respondent is going to direct his questions just to one part of the other side's concerns, if I may put it that way, then the Court isn't going to have the whole story about the other side's concerns. If that approach is taken, is that going to lead to the asking of questions which will be objectionable under usual rules? Is that something to keep in mind or have you no concern about that?

Mr. Mackay: No, if your Honor please, it is not my purpose, and I probably used the wrong word in my objection. It is not my purpose to keep the full story from the Court. I have no objection to this witness' testifying as to the substance of conversations and the negotiations leading up to [422] that. I just assumed from that that the question was a little too broad.

The Court: I thought it was a narrow question. I thought it was a question related to one subject that might have been discussed.

Mr. Mackay: Well, I may have misunderstood

(Testimony of Oscar Wiseman.)

that question. It is not my purpose to keep the Court from having both sides. I want them to have a fair hearing. I will withdraw the objection.

The Court: The Respondent's line of questioning seemed to start off by limiting the Respondent's evidence to just one particular matter. Now, if that is going to be the procedure, then the Court is going to have all the story on one side and part of the story on the other, and that is going to make it very difficult.

Mr. Maiden: No, your Honor, I am going to give you the full story on this side, but for the purpose of that one question I wanted to ask the witness to what extent the trade-mark entered into the first discussion between Mr. Wiseman and Mr. Dunlap.

The Court: Well, I think, Mr. Maiden, I will ask the question, because I am somewhat troubled about your question, and there has been some objection to it, I believe.

Now, what meeting are you talking about?

Mr. Maiden: That is the first meeting, of November 18, [423] 1942, in the office of Miller & Hazard, or Hazard & Miller.

The Court: Where did that meeting take place?

The Witness: It took place in the Lane Mortgage Building at Main and Eighth Streets, in Los Angeles.

The Court: In whose office?

The Witness: The office of Hazard & Miller.

The Court: What was discussed at that meeting?

(Testimony of Oscar Wiseman.)

The Witness: Principally the sale of all of the assets and all of the properties of The Vita-Food Corporation, a rehashing of a lot of complaints that Mr. Hanisch had against Mr. Lewis and The Vita-Food Company, a lot of threats about litigation that they were going to bring, a discussion of the humanitarianism of the various parties on both sides. It was a very general discussion and took a little bit over an hour.

The Court: All right.

Q. (By Mr. Maiden): Was any offer made at that conference to purchase the trade-mark?

The Court: Now, Mr. Maiden, the question was, what was discussed at the meeting and the witness answered the question. Now, did you leave anything out of your answer?

The Witness: Well, I did not relate all that was discussed. I merely outlined what the basis of the discussion was.

Mr. Maiden: Well, I want it in detail. [424]

The Court: You know what the trouble is with leading questions, don't you?

The Witness: Yes.

The Court: And you know the way to avoid asking a leading question is to ask the witness to state in his own words what happened, or anything else. Now, I asked you to state in your own words what happened, to get away from counsel for the the Respondent asking you a leading question. Now, if you haven't fully answered the question that the Court asked you, please do so now.

(Testimony of Oscar Wiseman.)

The Witness: All right. Mr. Dunlap told me that Mr. Hanisch had sustained some very substantial losses over a year and a half period, and that he wanted to put a stop to those losses.

I told him that that was perfectly agreeable to me. We had served our notice of cancellation and we were willing to abide by that. We had no desire to cause them any harm. However, we did desire to insist upon our legal rights, and it was my purpose as counsel for The Vita-Food Corporation to preserve those rights.

I think he brought up—I recall that he brought up something to the effect that in view of our limited cancellation, that possibly they could not sell other products.

In that connection I told him that it was not our purpose to stop them from selling anything they wanted to— [425] any other vitamin product they wanted to, so long as they did not use our trade-mark, and I told him that if they wanted to, we would enter into an agreement whereby they would be free to do that provided they would agree in writing not to attempt any marketing under our trade-mark, and that we were perfectly willing to enter into general releases to that effect.

He said, "No," he said, "Mr. Hanisch feels personally about this 'Stuart formula' trade-mark, and he wants the trade-mark and he wants the assets of the company," and that he wanted to retire The Vita-Food Corporation from the pharmaceutical field.

(Testimony of Oscar Wiseman.)

There was also some discussion about—he told me that there had been some misrepresentation to him about the nature of the plant of the Vita-Food Corporation.

I asked him what those were, and he said, well, they had been led to believe that it was a big plant and that sort of thing and actually it wasn't. I told him that I had seen the plant, and while it wasn't the largest plant in the world, it was an efficient and adequate plant to produce whatever was required.

He told me yes, they knew that the plant was in South Pasadena and had a pretty good lineup on it. He told me that he understood that the tablets were not made at The Vita-Food Company, and I said I had personally seen vitamin tablets made to this extent, that the vitamin tablets—the main [426] ingredients were compounded and mixed, and I had seen the physical mixing of these ingredients, at the Vita-Food plant, and that from the Vita-Food plant they were sent to another company which sugar-coated them and actually put them in bottles.

He said he knew the name of that company and he understood that they did the complete operation.

I told him that, from my personal observation, that wasn't true. I had seen the tablets actually made except for the sugar-coating and the actual bottling.

He also told me—and he was quite flattering in part—he told me that both he and Mr. Hanisch thought I was a swell fellow and that I had handled the cases involving the infringement of the trade-

(Testimony of Oscar Wiseman.)

mark that arose in the Sontag and Thrifty drug stores, very well, and he liked the way I had handled decisively some spoilage that occurred, and that he liked doing business with me and that they were very happy they didn't have to deal with Mr. Lewis in this matter.

I told him that I wasn't interested in the fight that had gone on before, that I had not participated in, what apparently was a battle over the May 5th contract, that I was there to do a job, and if he had any serious offers to make, that we would give them consideration.

The Court: Do you recall anything else that Mr. Dunlap said to you? [427]

The Witness: He told me that he had a notice of rescission ready to go and that they were preparing to file a lawsuit.

I told him that we did not want litigation on it, that if we were forced to, we would take legal steps, too. I told him that in my opinion a rescission action on their part would be ill-founded because to ask for equity relief they would have to show that they had done equity, in that they had failed to meet their quotas and, as far as I could see, they had a lot of complaints and some sort of a fictitious claim on the trade-mark, but that actually they were in a position of having defaulted on their contract and that they did not have any right to equitable or other relief; that we had conditionally or partially canceled the contract, so that if there was still a basis for working things out, we would. I did not

(Testimony of Oscar Wiseman.)

want to take any harsher measures at that time we had to.

Mr. Maiden: May I ask the witness a question?

The Court: Can you think of anything else that he said or you said?

The Witness: Yes. I told him that we were only interested in dollars and cents figures on a settlement.

He said that they did not want the relationship of manufacturer and distributor. They did want the trade-mark, but a lawsuit would hurt the trade-mark. I think his words [428] were that "the lawsuit will kill the trade-mark."

The Court: Was this the first meeting you had?

The Witness: This was the first meeting, yes, your Honor.

The Court: How did you get to the point of talking on any settlement at the time of the first meeting?

The Witness: Well, we had discussed the fact and it was acknowledged that we had served a notice of cancellation upon them and they had served a notice of rescission upon us, and Mr. Dunlap asked me to meet with him for the purpose of seeing if there wasn't some way of settling the differences between the two companies.

The Court: You mean settling in that sense, that is, working something out, is it?

The Witness: Yes, it is, your Honor.

The Court: Can you think of anything else?

The Witness: Yes. He said that they might

(Testimony of Oscar Wiseman.)

want to work out something on a royalty basis and on a liberal figure, and it would have to be determined within 48 hours; that either they would have things worked out to their satisfaction within 48 hours or they were going to file a lawsuit.

I told him I wasn't interested in any time limit, that we would consider any reasonable suggestion he had to make, and that I did not consider his suggestion up to that time reasonable, and worth submitting to my clients. [429]

The Court: Was anything else said?

The Witness: Yes. He told me earlier in the evening that Mr. Lauerhass and somebody else, whose name I don't recall, were underpaid in the office, and that Mr. Hanisch and their office felt that they were all working for The Vita-Food Corporation, and that they wanted to put a stop to that.

Also, Mr. Dunlap told me that Mr. Hanisch had told him that "he was going nuts"—that is a quotation—that before he had gone into this he had thought of going to the Harvard Law School. There were many things discussed. I have some kind of notes on some of them, and I am trying to recall what was said.

Mr. Mackay: May I make one inquiry? Were those notes made at the time of the conference?

The Witness: Yes, I made these in front of Mr. Dunlap.

Mr. Mackay: Are those the original notes you made?

(Testimony of Oscar Wiseman.)

The Witness: Those are my original notes in my own handwriting.

Mr. Mackay: All right.

The Court: Did you make any proposals to Mr. Dunlap?

The Witness: Yes, I made the one proposal that we would execute mutual releases and they would disclaim any so-called claims they might have to our trade-mark, and manufacture or distribute any products they wanted to, and that we [430] would go ahead and do our own marketing under "The Stuart Formula." They could go ahead and sell our products if they wanted to, on a non-exclusive basis, unless we made another exclusive arrangement with some other firm later on. We would, of course, premit them to exhaust their stocks on hand.

Do you want me to go on, your Honor? There are a couple of other things.

The Court: Yes, I want you to finish what was discussed at this meeting. You can go right on and talk as long as you want.

The Witness: Well, I don't want to talk very long at all, your Honor, actually, but there was some discussion—Mr. Dunlap said that he felt some misrepresentations had been made by their detail men as to the contents of the product.

I told him that that was nonsense, there was nothing wrong with that, that I had personally handled the revision of the label before the—I think it was the Food and Drug Board, and had adjusted the label to meet the conditions required by that board,

(Testimony of Oscar Wiseman.)

and, as indicated, I believe it was the report of the Federal Security Board which had set up some minimum standards on vitamins, and I told him that was another matter that we were not prepared to discuss, that that had been discussed. When the label had been determined I had met with Mr. Lauerhass and Mr. Swanfelt, of Lord & Thomas, who had prepared drafts of the labels, and we had the opinion [431] of the Food and Drug Board, and I had the opinion of Dr. Borsook and also consultation with Mr. Lewis, and we were extremely careful to see that the label was accurate, and I believe it was.

Mr. Dunlap asked me whether or not Mr. Lewis was the only stockholder, whether or not The Vita-Food Corporation was the alter ego of The Vita-Food Corporation.

The Court: The alter ego of whom?

The Witness: Lewis and the Vita-Food—he in effect wanted to know if they were one and the same, and I told him no, that there were other stockholders, and I also told him the principal reason why I was handling the negotiations was partly because it looked like litigation was imminent and I was the lawyer for the company, and also the other stockholders of The Vita-Food Corporation felt that the matter had become more or less a personal issue between Mr. Hanisch and Mr. Lewis, and that it would be better if we broke that up and tried to deal on an impersonal basis and tried to work out the various problems which existed between the companies.

(Testimony of Oscar Wiseman.)

Mr. Maiden: May I have my witness, if the Court please?

The Court: I want the witness to finish his answer to the question. When he has come to the end, he can say, "That is all."

The Witness: I believe Mr. Dunlap also [432] told me that The Stuart Company could, if they had the trade-mark, get supplies and materials from other manufacturers at substantially lower prices than the rate then being charged by Vita-Food to Stuart.

I told him that that was possibly so but that I did not believe they were in any position to complain about the price unless they were able to meet their quotas, that, at least as far as my official capacity with the company was concerned, I wanted to see the prices reduced, too, but unless they stabilized the market and we knew how much we could sell on a quantity basis, there was not much point in changing the price structure.

I think we also discussed during that meeting the fact that we had drawn a Dun & Bradstreet report on them and they had drawn several Dun & Bradstreet reports on our company, so that we both had a pretty good idea of the financial position of each other's company.

There was also some discussion—Mr. Dunlap asked me what other trade-mark cases I had handled, and I mentioned a few. I don't think that is important, your Honor. I will not go into it further,

(Testimony of Oscar Wiseman.)

your Honor, but we did discuss—he asked me if I had had some experience, and I mentioned several trade-mark cases that I had handled prior to that time.

That is substantially it, your Honor. I can't recite every word or all of it. Maybe something else will [433] come to me, but that is the substance of it.

Q. (By Mr. Maiden): Mr. Wiseman, you stated in answer to the Court's question that at this first meeting you stated that The Vita-Food Corporation would be willing to execute mutual releases?

A. Yes, I so testified.

Q. Exonerating both parties from the——

The Court: Are you asking him a leading question again?

Mr. Maiden: No, I don't think so, your Honor. I am trying not to.

The Court: Very well. You asked him if they wanted to execute mutual releases, and then you are telling him what those mutual releases would contain.

Mr. Maiden: I beg your pardon. I probably was getting into the realm of leading the witness.

Q. (By Mr. Maiden): Mr. Wiseman, tell the Court what consideration was to pass for the mutual agreements, if any.

The Court: Well, was that discussed in this meeting?

The Witness: Yes, I told him that——

(Testimony of Oscar Wiseman.)

The Court: You didn't finish telling the Court everything that had been discussed at that meeting, did you?

The Witness: I believe I told this to your [434] Honor.

The Court: No, you didn't mention any money at all.

The Witness: There wasn't any money mentioned in this, that I think counsel's question is directed to.

The Court: Well, "consideration" usually means money.

Mr. Maiden: Well, your Honor, I asked him what consideration was to pass in the exchange of the mutual releases, and I wanted him——

The Court: Was that discussed?

The Witness: Yes, at least I told him that we were prepared to let them sell whatever they had on hand, and that if all he wanted was termination of the contract, that was perfectly all right with us, we would execute mutual releases provided they disclaimed what I considered fictitious claims to the trade-mark. That is all we wanted, was a disclaimer in view of the fact that he had raised the point, and I so told him.

He told me that Mr. Hanisch felt that he had gotten in too deep and had lost too much money, and that he couldn't recoup unless he had the trademark.

Q. (By Mr. Maiden): Now, Mr. Wiseman,

(Testimony of Oscar Wiseman.)

when was the date of the next conference you had with Mr. Dunlap?

A. Well, it was a couple of days later, and it was at the Town House in Los Angeles on Wilshire Boulevard. [435]

Q. At whose request? A. Mr. Dunlap's.

Q. You say it was held where?

A. At the Town House.

Q. That is a hotel in Los Angeles?

A. Yes, it is on Wilshire Boulevard, what I think is opposite Lafayette Park.

Q. Who was present at that meeting?

A. Mr. Dunlap and myself.

Q. Now, will you tell the Court, in the same detail that you did in answer to the Court's question with respect to the first conference, everything that was said that you can remember between you and Mr. Dunlap?

A. Well, there was some repetition of the previous meeting's discussion.

Mr. Dunlap said they were prepared, I think, to pay $50,000.00 down to take The Vita-Food Corporation and Mr. Lewis out of the pharmaceutical field, and they would pay a royalty to Vita-Food for five years. Then, he added a little later, that they would also hire Mr. Lewis on a consulting basis and they would escrow the trade-mark until all the payments were made.

I told him that that payment was inadequate—that price. He asked me what we wanted, and I told him that we would sell the trade-mark—I believe

(Testimony of Oscar Wiseman.)

the price I mentioned was [436] $300,000.00 or $350,000.00, that we were not interested in selling the plant facilities of the company and we were not interested in going out of the pharmaceutical field, and that I did not consider it fair to discuss Mr. Lewis as a person on a consulting basis with them; that the Vita-Food Corporation was not Mr. Lewis' private property and I couldn't understand why he would make that type of suggestion in view of all the difficulties they had with Mr. Lewis. I told him it just didn't make sense, "that after all the trouble you say you have had, now you want to make some disposition and you want him to be your consultant for five years."

I said, "In any event we are not interested in that, because we want a settlement between The Vita-Food Company, if any, and a sale of the trade-mark between the companies, and the individual officers are not to be concerned."

Mr. Mackay: Are you reading from notes?

The Witness: I have some notes also on that meeting. I am not reading from notes, but I have some notes.

Q. (By Mr. Maiden): Are they notes taken during the meeting or shortly after the meeting?

A. These were taken—I wrote them out in Mr. Dunlap's presence, and some he practically dictated to me, his terms of offer.

Q. Go ahead, Mr. Wiseman, and do it in [437] detail.

(Testimony of Oscar Wiseman.)

A. He told me that they could get the liquid or the tablets for 48 cents a bottle instead of, I believe, the 73 or 89 cents a bottle that they were then paying us. He suggested that there be a profit limitation of both companies to 20 per cent until the royalty or that sort of thing was made out.

I told him that his offer was not acceptable.

Then he told me this: He said, "We will take an inventory of your plant and pay you dollar for dollar for the value of your plant and all merchandise. We will pay you an amount necessary to cover your attorneys' fees in handling the transactions, and 15 per cent of their cost of merchandise for five years."

I also told him that that offer was not acceptable.

He reiterated a lot of the pain and suffering that Mr. Hanisch had had until that time, and told me that they were anxious and willing to make some sort of an arrangement.

Q. Arrangement about what, Mr. Wiseman?

A. To dispose of all disputes between the companies on some basis or another. I just can't remember all of that, your Honor, at this moment. There were a lot of things discussed. That discussion went from 3:00 o'clock in the afternoon until 6:30 that evening.

Q. Mr. Wiseman, was anything said at this second meeting with respect to execution of the mutual consent you spoke [438] about as having occurred at the first meeting?

Mr. Mackay: I object to that as a leading question.

(Testimony of Oscar Wiseman.)

The Court: You can answer yes or no.

The Witness: Yes.

Q. (By Mr. Maiden): What was it, Mr. Wiseman?

A. I believe I repeated my previous offer that we could call it quits and they could disclaim any interest they had in the trade-mark, and they could go about their business and get some other trade-mark or do whatever they liked.

Mr. Dunlap wasn't interested in discussing that phase of it at all.

Q. Now, that second meeting was on November 20th. Now, when did the next meeting occur, Mr. Wiseman?

A. The following Sunday, I believe, Sunday, November 22, 1942.

Q. Now, tell the Court in similar detail what occurred at that conference and who was present at the conference.

A. Well, that conference started at 3:00 o'clock in the afternoon and wound up four hours later at 7:00 p.m.

Mr. Dunlap, myself, and Mr. Hanisch were present. Mr. Hanisch was very friendly to me. He was very flattering about how nicely I had disposed of a number of matters before, and that how glad he was that I was handling the matter at this stage instead of Mr. Lewis, whom he detested, and [439] so forth, in a lot of language. He raised the offer to $100,000.00.

Q. Offer for what, Mr. Wiseman?

(Testimony of Oscar Wiseman.)

A. For the trade-mark, and wanted us to take that on a payment basis.

I told him that the only thing we were interested in, if at all, was a cash deal for the sale of the trade-mark, that we had had a financial statement on him, and as far as we were concerned, he and The Stuart Company were one and the same, that it was a mere shadow of a company, that unless he agreed to carry out any settlement or any agreement that we had, it would be worthless to us, that he had the financial backing to pay for the price of anything that was agreed upon.

Q. What were you asking at that conference for the trade-mark?

A. I believe the price that I asked was $300,000.00.

Q. Is there anything else that you can recall that took place at that conference, Mr. Wiseman, that would shed some light on this problem the Court has to decide?

A. Well, I don't believe that we discussed at all their claims to the trade-mark. I don't believe that was discussed at all. I think that we discussed the sales and the quotas and the amount they purchased month by month.

Q. What information, you mean in the payment?

A. Yes, the steps leading up to the cancellation.

The Court: You did discuss cancellation of contract? [440]

The Witness: Oh, yes, we did that.

(Testimony of Oscar Wiseman.)

Q. (By Mr. Maiden): What was the nature of that discussion?

A. The nature of that discussion was that Mr. Hanisch told me that he could buy vitamins cheaper than he could buy them from Vita-Food, and that he wanted to market under the name "The Stuart Formula," and buy from other people, that he could make a great deal more money that way than he would with a Vita-Food contract. He detested Mr. Lewis, and wanted to be free to market vitamins under the name "The Stuart Formula," and I told him that I had——

The Court: He said he wanted what?

The Witness: He wanted to be free from any requirement to purchase vitamins from The Vita-Food Corporation, that he wanted to market vitamins under the name "The Stuart Formula," and he did not want to have anything more to do with Mr. Lewis.

The Court: That was what he told you?

The Witness: Yes, and I told him that he could buy the trade-mark if he paid enough for it. We were willing to sell it. I also told him that he could market vitamins under any other name he wanted to, without paying us anything, provided he disclaimed this so-called claim that they might have to the ownership. [441]

Q. (By Mr. Maiden): Ownership of what?

A. Of the trade-mark.

The Court: That was a 10-year contract, wasn't it?

(Testimony of Oscar Wiseman.)

The Witness: I believe it was.

The Court: So, if the Vita-Food Company could get something, if it could hold the other party to the contract to sell its products, wouldn't it be making sales of products through the other party to the contract?

The Witness: That is right, if The Stuart Company sold its products, they would——

The Court: No, that wasn't my question. I said, if the other party continued selling goods, why, Vita-Food would be making some money over a 10-year period, wouldn't it? You had them on a 10-year contract, didn't you?

The Witness: Yes. It would depend upon the circumstances.

The Court: Your notice of rescission was—what was it, what was that notice?

The Witness: We terminated their exclusive agency.

The Court: You told them that they couldn't have the exclusive rights to sell any more?

The Witness: That is right.

The Court: What did you understand, then, that they would do under that contract?

The Witness: Well, I understood this—— [442]

The Court: The terms of the contract, after you had given the notice of rescission—what was your understanding of what was left for them to do under the contract?

The Witness: Well, that was answered by their acknowledgment and their own rescission.

(Testimony of Oscar Wiseman.)

The Court: No, I didn't ask you that. I asked you what was understood?

The Witness: I understood from the notice of cancellation and the acknowledgment and the rescission that we got immediately thereafter, that the contract was terminated for all purposes.

The Court: That was a cross-notice. I am talking about your notice. You sent them a notice of rescission. Now, what was your understanding of their status under the contract after you sent their notice and before they gave you any notice?

The Witness: I understood simply that their exclusive contract was terminated, that the contract in other respects stood.

The Court: For the balance of the 10-year contract?

The Witness: Unless we acted further and gave them further notice.

The Court: Up to that time there hadn't been any other defaults. Is it understood, then, they would be bound to sell under the terms of that contract for the remainder of [443] 10 years, but without the exclusive privilege, is that right?

The Witness: That is not right, your Honor.

The Court: I am trying to find out from you what you understood their status would be under that contract after you gave them the notice of rescission.

The Witness: Well, I don't know whether it was in the first meeting or the second meeting that Mr. Dunlap and I discussed that, but he raised that very

(Testimony of Oscar Wiseman.)

point. I told him then, and it is my position now, that upon the termination of the exclusive agency we could not restrict their other sales, because that type of restriction would violate the anti-trust laws. We made no contention, and I so told him. They were free to do whatever they pleased.

The Court: I am asking you if it was your contention that they would have to continue to sell—would have to continue to buy some of the products offered to them by The Vita-Food Corporation under that contract.

The Witness: No.

The Court: No?

The Witness: No. [444]

The Court: What did that contract mean? It was a 10-year contract, and you examined that contract, I suppose, a good many times before you had that conversation with Mr. Dunlap?

A. Yes, I did, your Honor.

Q. And, under clause 6, they were given the exclusive right to sell Vita-Food products, provided they met their quotas, isn't that right?

A. That is right.

Q. If they didn't meet their quotas, you had the right to give them notice, rescinding that exclusive feature of the contract, didn't you?

A. That is right.

Q. All right. Now, it was a 10-year contract. If they didn't deliver, if they didn't sell the quota they had agreed to, what was your understanding of their only obligation to Vita-Food Corporation, un-

(Testimony of Oscar Wiseman.)

der that contract, for the balance of the 10-year term thereof, talking about their duty to Vita-Food Corporation and to no one else?

A. I don't think they had any duty, other than the obligation any jobber would have had if they had merchandise on hand.

Q. That is your position, then, that they were not bound under that contract to continue to sell some products for Vita-Food Corporation? [445]

A. That is right. I might explain that, if your Honor wants an explanation.

Q. Did you state that position to Mr. Dunlap?

A. Yes, I did. I told him that we had used an intermediary step, because we didn't want to use any harsher methods than absolutely necessary, that the contract called, for example, product liability insurance. We continued to carry that. The contract fixed certain prices, how the orders were to be placed, and other things. We felt that pattern could be continued if they wanted to go on a non-exclusive basis. We did not want to restrict them as to other operations they might have. They could sell anything they wanted to, provided they didn't use our labels or our trade-mark.

Q. They could go on selling on a non-exclusive basis under that contract for the balance of the 10-year period, is that right?

A. That is right, if they wanted to.

Q. There wouldn't be any quota basis, but would they be obligated to buy some products from Vita-Food?

(Testimony of Oscar Wiseman.)

A. No, they weren't obligated to buy anything from us, under the contract, except if they didn't maintain our quota, they would lose their exclusive agency. We could terminate it on that ground, or cancel it, as I recall. It was our intention to cancel it entirely, except, as a preliminary step, we took a milder position. That is all there was to it. [446]

The Court: Do you think he has gone over everything that happened at that November 22nd meeting?

Mr. Maiden: I was just going to ask.

The Witness: I don't believe I covered everything, but I have covered everything I recall at the moment. If you ask me a specific question about something there, I might recall something further. It was a four-hour conversation and I can't retell it all in 15 minutes.

Mr. Maiden: Well, unfortunately, I wasn't present at that conference and I have no knowledge of what——

The Witness: There was one other thing we did discuss. We discussed the price for a sale and we discussed the manner of payment, and up to and including that meeting, at all times, I insisted on a cash deal, and we clarified the position to Mr. Hanisch so he understood he wasn't going to buy any plant, and he told me he heard the plant didn't amount to much. He reiterated what Mr. Dunlap told me. They knew it was in South Pasadena and knew pretty much about it. I told him the plant

(Testimony of Oscar Wiseman.)

wasn't for sale. The only thing we were concerned about selling was the trade-mark.

The Court: What kind of a plant did they have?

The Witness: Do you want me to physically describe it?

The Court: Did you ever see it?

The Witness: I was in it a number of [447] times.

The Court: How many employees did they have?

The Witness: Oh, I think there were about 10 or 15. It was a building, a commercial building, in South Pasadena. I would say the floor area was about, possibly, 3,500 to 4,000 square feet.

The Court: What was the address?

The Witness: I don't recall the address, but it was on Fremont Street and there were a lot of electric motors and vats with agitators and measuring devices, a lot of equipment for compounding tablets and liquids, a lot of bottles and—it was stocked to the ceiling. A lot of labels. And people were working, running the machinery, and people were working, bottling liquids and tablets, at various times. It was a nice, clean, sanitary plant; rather limited capacity, but they could pop out an awful lot of bottles in 24 hours. I observed a number of times, in view of some of these claims made; I personally went down and stayed morning and evening to see just how much they did, and they produced quite a few things, when they wanted to.

As a matter of fact, one of the complaints we had was that The Stuart Company would give us an

(Testimony of Oscar Wiseman.)

order, we would produce that in a few days, and then lay everybody off for a while and then put them back on. That ran our expenses up quite high. If we had an even flow, if we could meet the quotas, we could have kept the people working [448] continuously. It ran our costs up quite a bit. Things had to be started all over again; some of these vats, the liquid solution, vitamin solution, was prepared—I would say there were half a dozen of them that had perhaps a hundred to two hundred gallons capacity, and they had to be mixed, I believe, under temperature control. It took quite a while to get those things started, whereas, if it could have been kept in continuous operation, it would have been a lot less expensive for us to operate the plant.

While I was vice-president of the company, we would stop and start many times, and the plant was shut down. I had complaints from the plant superintendent many times, telling me it was extremely difficult for him to keep employees. We had to break in new employees from time to time, because we did not have an even flow of production that we could plan on.

Q. (By Mr. Maiden): Now, is there anything else you wish to state with respect to that November 22nd conference?

A. Nothing, except that I concluded that we were not going to reach a settlement and I concluded that we would proceed—we did discuss the notice of rescission, their acknowledgment, but I concluded when the meeting broke up, we were going to have

(Testimony of Oscar Wiseman.)

litigation and we might as well get our lawsuit on file first. [449]

Q. Litigation with respect to what?

A. The injunction suit which I filed, which I think is your Exhibit 15 or 16.

Q. What did you understand the subject-matter of the litigation would be?

A. I don't know what—Mr. Dunlap indicated he might bring some suit for rescission. That is all I knew about theirs. As far as we were concerned, I had recommended that the lawsuit, exactly of the type that was filed, be filed, and that was to prevent them selling anything under our label and under our trade-mark.

Q. Well, what causel you to file the injunction suit; what prompted that injunction suit? Did you have any reason to believe it was necessary to file that suit?

A. Yes. Mr. Dunlap told me, and Mr. Hanisch backed him up in all the meetings we had up to and including that one, that they felt if they didn't make a satisfactory arrangement, they were going to go on the basis they owned the trade-mark, that they could market anything they pleased under that; that they would buy it from whatever supplier they could find, and it was my intention in preparing and filing that lawsuit and in getting out the injunction, to stop them from marketing anything under that trade-mark and that label, other than the brands manufactured by The Vita-Food Corporation.

(Testimony of Oscar Wiseman.)

Q. You had no other intention in that injunction suit? [450] A. I did not.

Q. Now, Mr. Wiseman, did you have any further conferences with either Mr. Dunlap or Mr. Hanisch after November 22nd, up until the conference of November 28th?

A. No, except that the conferences on November 28th were in several sections. It started around 6:00 in the evening at the hotel and was adjourned and reconvened in Mr. Dunlap's office at 8:30 that evening.

Q. Now, this is a very important occasion in the lawsuit and the Court will be anxious to know in detail what discussions were had on that occasion, which culminated in this agreement which is in evidence, and what you understood the agreement to represent.

The Court: Now, the agreement of settlement is dated November 28, 1942. They didn't work out that agreement at the meeting on November 22nd, as I understand.

Mr. Maiden: He was talking about the conference beginning on November 27th.

The Court: 27th or 22nd?

Mr. Maiden: November 27th, which started, I believe, he said, about 6:30 in the evening.

The Court: Then, I have the wrong dates. The dates are November 18th, November 20th, and November 27th, is that right?

Mr. Maiden: No. There was a conference on November [451] 22nd. I am getting up to the con-

(Testimony of Oscar Wiseman.)

ference, if the Court please, which drafted this agreement which is in evidence.

The Court: Now we are talking about November 27th, is that right?

Mr. Maiden: November 27th, November 28th.

Q. (By Mr. Maiden): Will you tell when the conference started and when it ended; that is, the conference at which this agreement was drawn up and executed?

A. Well, it started at 6:30 in the evening.

Q. What date?

A. At the hotel, on Friday, November 27, 1942. Present were Mr. Dunlap and myself.

Q. Now, when did that conference end?

A. The conference ended about 8:30, and then we immediately started again a few miles away, at Mr. Dunlap's office, I believe, in the First Trust Building in Pasadena, at 8:30, and we went on from there until 6:00 in the morning, November 28, 1942.

Q. Now, Mr. Wiseman, tell the Court what took place at that conference; the discussions that were held and what your understanding was of the substance of the agreement entered into by the parties on that occasion.

A. Well, Mr. Dunlap had called me up and wanted to meet with me. Finally I talked to him on the phone. He told [452] me that we had beaten him to the draw and filed our lawsuit first, and that looked like I had sued everybody and served everybody in Pasadena. I believe that is just about what

(Testimony of Oscar Wiseman.)

he told me. In any event, he would like to talk to me about it and could he meet me at the hotel.

Q. Did you solicit that conference?

A. I did not. Mr. Dunlap called me on the phone and arranged it. Anyway, when I met with Mr. Dunlap, I believe—I don't recall it—but I think we had dinner together. I am not sure, but at least we met at the hotel and discussed this thing.

Q. Pardon me.

Mr. Maiden: If your Honor please, it is quite obvious we can't finish with this witness today, and since Mr. Mackay and I have an agreement, if it is agreeable with the Court, that we will continue the case—I mean we will have a setting of the case on Saturday, tomorrow—I would like to make a motion at this time we adjourn until 9:30 or 10:00 o'clock, or whatever suits your Honor's convenience.

The Court: Is that agreeable?

Mr. Mackay: Quite right.

The Court: What time do you want to start in the morning?

Mr. Mackay: I would suggest as early as convenient to your Honor. [453]

The Court: We will recess until 9:30 tomorrow morning.

(Whereupon, at 5:30 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m. Saturday, January 31, 1948.) [454]

January 31, 1948

The Court: Proceed.

Whereupon,

OSCAR WISEMAN

called as a witness for and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Maiden:

Q. Mr. Wiseman, did I understand on your examination yesterday and the beginning of the conference held on the nights of November 27th and November 28th, 1942, commenced at some hotel?

A. Yes.

Q. What hotel was that?

A. The Vista del Royale in Pasadena.

Q. Do you have any idea why the conference was held there?

A. Well, I was living temporarily in a little apartment hotel and Mr. Dunlap asked to see me, I believe, the day before, which was Thanksgiving or something, or it was Thanksgiving; I don't recall exactly. But he finally asked me to meet him at my hotel.

(Testimony of Oscar Wiseman.)

Q. How did he get in contact with you?

A. Well, he phoned me. I don't recall whether he [456] phoned me at my apartment or at my office, but he phoned me, I think, the 24th or the 25th, when we filed our suit.

He called me about four or five times during that day and I had stopped my calls. I knew he called, and I did not want to talk to him, because I was busy getting the lawsuit on file.

He finally got hold of me, I think, on the 27th, and asked me if I would meet with him. I told him that I didn't see much point in it, that we had discussed the case rather thoroughly and that we had filed our action and that it seemed to me that we were in a lawsuit and that was it.

He says, "Well," he says, "I want to talk to you." He said, "I have talked it over further with Mr. Hanisch and I think maybe we can make you an offer that would be worth while."

So he met me at the hotel and we discussed the case further at the hotel.

Q. How long were you at the hotel? Did you stay there all night?

A. That hotel? No. That night Mr. Dunlap and I talked until about 8:30 and then we went over to Mr. Dunlap's office about 8:30 the evening of November 27th and carried on the discussion there.

Mr. Hanisch joined us sometime later in the evening and we stayed on through until 6:00 o'clock of

(Testimony of Oscar Wiseman.)

the following [457] morning, until we finally disposed of the matter.

Q. In other words, you all stayed together until the agreement had been finally completed?

A. Not all of us. Mr. Dunlap and I were together substantially all the time from 6:00 o'clock p.m. of the 27th of November until 6:00 a.m. of the 28th.

Q. Now, will you explain to the Court the reason for the manner in which $122,700.00 was to be paid Vita-Food?

A. Well, that was simply part of the total consideration for the sale of the trade-mark.

Q. Do you have any explanation as to why it was to be paid in the manner provided in the agreement?

A. Yes. There was extremely—they debated practically all night how that was to be paid and finally the terms agreed upon were done so partially as a convenience, and I presume primarily as a convenience to The Stuart Company and Mr. Hanisch.

He said he wanted the money paid through The Stuart Company rather than by his direct check, insofar as he was able to, because he had made considerable loans to the company in the past and for his tax picture and so on he was a lot better off having the payments made by The Stuart Company.

Q. Was this entire consideration of $197,700.00 to be paid in any or all events? [458]

(Testimony of Oscar Wiseman.)

Mr. Mackay: I object to that, your Honor. It calls for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Maiden): Now, Mr. Wiseman, will you tell the Court what you understood to be the consideration passing from Vita-Food Corporation,——

Mr. Mackay: Your Honor, please,——

Q. (By Mr. Maiden): ——to The Stuart Company?

Mr. Mackay: Just a moment. No.

The Witness: We were selling a trade-mark. That was the consideration.

Mr. Mackay: I move that be stricken, your Honor, as a conclusion of the witness.

Mr. Maiden: If the Court please,——

Mr. Mackay: It is a pure conclusion.

Mr. Maiden: If the Court please, Mr. Dunlap was given great liberty with respect to explaining what his understanding of the parties was, with respect to what the Stuart Company was accomplishing under that agreement.

Certainly, in all fairness to Respondent, I should be permitted to have Mr. Wiseman tell the Court what his understanding was of the true consideration passing from Vita-Food Corporation, as he understood it, on that occasion [459] and under this agreement.

Mr. Mackay: It goes farther. I believe, your Honor, it goes farther than a mere question of intent, as Mr. Dunlap's testimony revealed.

(Testimony of Oscar Wiseman.)

Would you please read that last answer?

The Court: Read the question and answer.

(The record was read.)

Mr. Mackay: If your Honor please, it seems to me that is the ultimate question that the Court has to determine. It seems to me that raises purely a legal question. It is going far afield, I think, from the intent of the parties which I grant they have a right to go into. That question and answer, I think, are improper.

Mr. Maiden: If the Court please, I am very certain that Mr. Dunlap was permitted to testify that it was his understanding and that it was his intention that the consideration paid under the agreement was for the cancellation of the contract. That is the identical situation we have here.

The Court: If the answer represents a conclusion on the part of the witness, then the answer should be stricken. If the answer represents the understanding of the witness, then the answer is not objectionable.

The Court will understand the answer to represent the witness' interpretation, and that is still a matter for the Court to determine, whose interpretation is the best and [460] most reliable, so the objection is overruled.

Q. (By Mr. Maiden): Now, Mr. Wiseman, were the parties able to readily agree upon the terms of the agreement?

A. No. In the meeting I had with Mr. Dunlap first at the hotel and later the meeting at his office,

(Testimony of Oscar Wiseman.)

in his office, we argued strenuously practically all night until it was finally determined. We had considerable discussion at the hotel first, and we had a lot of discussion at Mr. Dunlap's office afterwards.

Q. Were there any rough drafts prepared that night?

A. Yes. Early in the morning when we were at a tentative agreement, Mr. Dunlap started typing and we had—well, he made—he started to make one draft and after the first couple of pages I had rejected it. It wasn't a very good typing job, anyway. So he started all over again and then the—I will call that the second draft—was rejected and again revised, and then there was the final draft which we accepted.

Q. Were the differences between you with respect to the drafts ones that had to do with the terminology? A. Yes; and the terms.

Q. And the terms? A. Yes.

Mr. Mackay: What is the difference [461] between "terminology" and "terms"? I withdraw that. That is a stupid question.

The Court: It is like my question yesterday about interstate and intrastate commerce.

Mr. Mackay: Mine is much worse, I am sure.

Q. (By Mr. Maiden): Mr. Wiseman, I notice this agreement of settlement contains, among other things, a provision whereby Vita-Food quitclaims without warranty this trade-mark. Can you explain to the Court the reason why you used a quitclaim conveyance? A. Yes.

(Testimony of Oscar Wiseman.)

Q. Would you do so, please?

A. We argued that point for at least an hour. Mr. Hanisch and Mr. Dunlap wanted a grant or terms of grant or general warranty used with regard to the trade-mark, and I told them we were perfectly willing to convey it, but it would only be on a quitclaim basis, because of their asserted claims that they might have had some title to it and there might have been some defect in our title.

I told them that there had been enough talk about fraud and misrepresentation, and that if an agreement was to be signed and I was to sign it there wouldn't be any argument later on about any misrepresentation about anything.

We finally compromised the point by inserting one warranty, and that is that the Vita-Food Corporation [462] had not theretofore made any transfer of its interest or of its interests in the trade-mark.

Q. Mr. Wiseman, do you have with you the copies of any of the drafts that were prepared there that night?

A. Yes, I have both of the drafts with me.

Q. These are two different drafts, is that right?

A. That is right. This is the first one which was only partially done (indicating).

Q. You don't have a better copy?

A. That was the only copy. As a matter of fact, I think that is in duplicate; so far as I know it is.

Mr. Maiden: Mr. Mackay, do you have a copy?

Mr. Mackay: I have never seen it.

(Testimony of Oscar Wiseman.)

Mr. Maiden: The third and fourth pages are not legible.

Mr. Mackay: I agree with you, it is not legible.

Mr. Maiden: I wouldn't want to impose on the Court with it. I don't have a more legible copy than this (indicating).

Mr. Mackay: I haven't seen one.

Q. (By Mr. Maiden): You do identify this as being the true original—this appears to be—one of the drafts made at that conference?

A. That was the second draft.

Q. That was the second draft? [463]

A. Yes.

Mr. Maiden: Your Honor, please, I would like to have this marked for identification at this time as Respondent's next exhibit number, whatever it is.

The Clerk: T.

(The document above referred to was marked Respondent's Exhibit T for identification.)

Mr. Maiden: If the Court please, the copy of the first draft is almost illegible and I just would hate to impose upon the Court by putting any such thing in evidence. I want to explain to the Court the reason why I am not, and it is on this account: I would like for the Court to look at these two last pages, for example.

The Court: You can read some of it. These are pinned together, the second page is a copy of the first and the fourth page is a copy of the third.

For the purposes of comparison, if you compare

(Testimony of Oscar Wiseman.)

that with T for identification I don't know whether it adds anything to the story or not. It is possible to read some of that. It is up to you to do what you want to do with that.

Mr. Maiden: Your Honor please, I am so anxious that everything will be right in this case for the Court to work with. I am going to ask that this copy of the—is this the first draft? [464]

The Witness: That is a copy. That is the original sheet and a copy, two pages; that constituted the first draft.

Q. (By Mr. Maiden): Do I understand that the last two pages are just a duplication of the first two pages?

A. No, the second page is a duplicate of the first page and the fourth page is a duplicate of the third page, as the Court indicated.

Mr. Maiden: I am going to ask the Clerk mark this for identification as Respondent's exhibit.

The Clerk: U.

(The document above referred to was marked Respondent's Exhibit U for identification.)

Mr. Maiden: If the Court please, I would like to withdraw these, as identified, and have them offered in evidence.

Mr. Mackay: No objection.

The Court: They will be received in evidence as Exhibits T and U.

(Testimony of Oscar Wiseman.)

(The documents heretofore marked Respondent's Exhibits T and U were received in evidence.)

Q. (By Mr. Maiden): Mr. Wiseman, will you state to the Court whether or not there is such a thing as a common law right in and to a trade-mark? [465] A. Yes.

Q. Would you explain that a bit, Mr. Wiseman? In order to have a common law title or right to a trade-mark, what is necessary, as you understand it?

Mr. Mackay: If your Honor please, I object to that. I don't think the witness has been qualified as an expert on patent law or trade-mark law.

The Court: Objection sustained.

Q. (By Mr. Maiden): Mr. Wiseman, will you tell the Court just what experience you have had in the field of trade-mark and patent law?

The Court: I think this matter is a matter that will have to be covered in the briefs, Mr. Maiden.

Mr. Maiden: Your Honor, I didn't know. That, of course, can be developed in the brief. But in view of the——

The Court: It is part of your legal argument.

Mr. Maiden: Yes. Well, I won't pursue the matter, if the Court please.

Q. (By Mr. Maiden): Now, Mr. Wiseman, did you have anything to do with the legal work in connection with obtaining the state and federal registration of this trade-mark in the name of Vita-Food Corporation? A. Yes, I obtained them. [466]

(Testimony of Oscar Wiseman.)

Q. With respect to obtaining the federal registration, did you associate with you any other attorney?

A. No. Mr. Dunlap asked me that question in our meeting at the hotel. Mr. Fulwider, I think, who was associated with me in the injunction suit, is a trade-mark and patent specialist. However, as I told Mr. Dunlap then, Mr. Fulwider had nothing to do with the trade-mark.

Q. In obtaining this federal registration, did you employ any Washington, D. C., attorney, patent or trade-mark attorney? A. Yes.

Q. Who was it, as you recall?

A. Well, Mr. Bryant, but I would like to explain that answer if I might.

Q. All right, Mr. Wiseman.

A. One of the things or the principal thing that resulted in my retainer by the Vita-Food Corporation was trade-mark questions, and I was specifically employed first to take care of this situation.

There was a 1905 application pending for the name of Stuart formula for about a year, I believe about a year, or for a considerable period. It had been handled through Mr. Bryant, an attorney, trade-mark and patent attorney in Washington, D. C., through Mr. Overton, who was previous counsel for The Vita-Food Corporation. [467]

In checking the case over I decided and recommended to the company that we withdraw the 1905 application and apply under the 1920 Act. I prepared the papers and they were filed and perhaps

(Testimony of Oscar Wiseman.)

the amendment to the case was signed by Mr. Bryant, but I didn't——

Mr. Mackay: If your Honor please, "perhaps" isn't evidence.

Mr. Maiden: I am going to show it.

Q. (By Mr. Maiden): Now, Mr. Wiseman, was an amendment filed with respect to the application pending asking certain additional statements be set forth in the application?

A. Yes, I believe I prepared the amendment to the application and sent it to Mr. Bryant for signature. Mr. Bryant signed it and filed it at my request.

Q. I will ask you to examine this file here and state just what it is, Mr. Wiseman.

A. Well, these are copies of the federal and state applications and amendments to applications by The Vita-Food Corporation regarding the trade-mark of "the Stuart formula."

Q. Does this file contain copy of an amendment?

A. Yes, that contains a copy of an amendment which I prepared.

Q. Where was that amendment filed, what court is it in? [468]

A. Well, it is before the United States Patent Office.

Q. United States Patent Office. You say you prepared that amendment yourself?

A. Yes, I did.

Q. Did you send it to Washington?

(Testimony of Oscar Wiseman.)

A. Yes, I did, to Mr. Bryant, who signed it and filed it.

Q. Did Mr. Bryant return you a signed copy?

A. Yes, he did.

Q. Is this the signed copy Mr. Bryant returned to you (indicating)? A. Yes, it is.

Q. This affidavit is a part of that application, is that right? A. That is correct, yes.

Q. Does this likewise belong to this amended application?

A. Yes. All the papers are in connection.

Mr. Mackay: Counsel, if you will let me have them and take a look at them, I think there will probably be no objection. I don't want to put you to a lot of unnecessary proof.

Mr. Maiden: I might explain to the Court why I am proving the matter of the amendment to the application. The certificate of registration which is now in evidence [469] has attached to it a statement showing that the application is under the Act of March, 1920. The date of the application is May 15, 1941. That is the date set forth in the registration.

Q. (By Mr. Maiden): Now, Mr. Wiseman, was that the date of the original application?

A. Could I see it a moment, please?

Q. 15th day of May, 1941. Was that under the 1905 Act?

Mr. Mackay: Well, it is shown in the record. I will stipulate that was the date there. It is shown right on the record.

Mr. Maiden: If the Court please, I have in mind

(Testimony of Oscar Wiseman.)

that maybe some basis for the assertion of The Stuart Company that Vita-Food did not have a good and valid title to this trade-mark is based upon the statement which I have just referred to, which is as follows: "The trade-mark has been continuously used and applied to said goods in applicant's business since April 5, 1941."

So far so good. But then follows one intervening sentence with this statement: "That the trade-mark has been in bona fide use for not less than one year in interstate commerce by the applicant."

Now, obviously, if it had been in use only [470] since April 5, 1941, and the date of the application was the 15th day of May, 1941, the statement that it had been in bona fide use for not less than one year would, without some explanation, seem to be a misrepresentation. I want to show by this file that the application was amended to bring it under the 1920 Act, and that the purpose of the amendment was to add in that statement I read the one sentence at the end of the statement, "That the trade-mark had been in bona fide use for not less than one year in interstate commerce by the applicant."

Mr. Mackay: Just a moment. As long as I understand what counsel said as merely a characterization, I have no objection to it.

Mr. Maiden: Of course, what I said is not evidence.

Mr. Mackay: Well, I hope not.

Q. (By Mr. Maiden): Do you know when this amendment was filed?

(Testimony of Oscar Wiseman.)

A. It was filed in July of 1942.

Q. Do you have a specific date in July it was filed? A. Yes, July 29, 1942.

Q. Will you state to the Court the purpose of the amendment?

Mr. Mackay: I object to that, if your Honor please. It is irrelevant and immaterial. The documents speak for themselves. It isn't a question of intent here as between [471] the parties; that is entirely apart from what we are discussing.

Mr. Maiden: I didn't want to clutter up the record.

The Court: I think, Mr. Mackay, since counsel for the Respondent is going into this and going to argue about it, the record had better be clear as to what the understanding was of the Vita-Food Company, who filed this amendment. I think we had better get this out of the way, because I really don't know just exactly what you are getting at at the present time or why you are getting at it. Go right through with it. The objection is overruled. Let's get through this particular phase of this.

Mr. Maiden: I believe I can save the Court a great deal of time.

The Court: Read the last question and answer.

(The record was read.)

The Court: Will you state the reason then?

The Witness: The purpose of the amendment was that I had rendered an opinion that the application under the 1905 Act was not maintainable, and that in view of several infringement cases we

(Testimony of Oscar Wiseman.)

had had we wanted to have the trade-mark registered so that upon any recurrence we would have prima facie evidence, at least, of our title against any company or companies who sought to infringe upon our trade-mark. And that is why, as an interim measure, I filed an application for [472] the California trade-mark. We wanted to have our registrations as quickly as possible because of the Rice and Boyle incident, and others that were rumored. It just put us in a much better position if the——

The Court: What was the Rice incident? How do you spell that?

The Witness: R-i-c-e. They simulated and put out our product, I believe, through the Sontag. And the Boyle——

The Court: They did what?

The Witness: Simulated the label.

The Court: Did they use the name?

The Witness: Not quite, but the shape of the bottle.

The Court: What did they do? What did they do?

The Witness: I don't recall. Visually, exactly what they did do, was take a bottle of vitamin product that substantially had the same content as ours. If you looked at the two labels and the two bottles about the only thing you could distinguish between them, as a customer would in a store, was that one label, I believe was brown and ours was blue. The simulation was so good that——

(Testimony of Oscar Wiseman.)

The Court: They used the name of Stuart Formula?

The Witness: No, they used some other name.

The Court: Did you bring suit against [473] them?

The Witness: No. I served a notice upon them and I got a written agreement from them to cease and desist, and they destroyed their labels and used a different label.

Q. (By Mr. Maiden): What was the other incident?

A. The other incident was very similar. The Boyle Laboratories were making a similar product for marketing through the Thrifty Drug Stores, which is a very big chain here.

The Court: Boyle concern out here?

The Witness: Yes. They were at Seventh and Alameda, approximately, in Los Angeles.

The Court: What did they do?

The Witness: They simulated the label and the package very similarly and I served them with a similar cease and desist order.

The Court: I have to ask you the same question. You see when things get into the record they are very vague. You say they "simulated." I understand what simulated means. You are talking about an infringement or a contended infringement. You will have to be a little bit more specific about it. What did they do to simulate your label?

The Witness: They used a bottle and they used a label, except for coloring or some other minor

(Testimony of Oscar Wiseman.)

matter, and [474] made it look very much like the product of The Stuart Company. It was brought to my attention by Mr. Lauerhass of The Stuart Company. They brought me samples of the bottle, I believe, and said, "We don't like it. They are copying our label and our bottle," in both instances; and they wanted it stopped.

The Court: They were using the same kind of bottles, is that right?

The Witness: That is right. It was an oval bottle they were using.

The Court: You can't prevent that, can you?

The Witness: Well, it is a matter of degree, your Honor.

The Court: If they use the name of Stuart Formula.

The Witness: No, I don't believe they did.

The Court: All right.

The Witness: They used some other formula and it was shaped and the lettering and everything——

The Court: They didn't use the name "The Stuart Formula"?

The Witness: No.

The Court: Did you bring a suit against them?

The Witness: No, we didn't have to file a suit. I served them with a cease and desist notice by registered mail. I later met, I believe, with their attorneys and got [475] them to sign an agreement to cease and desist, and thereafter they didn't mark it that way.

The Court: Was it a syrup product, like yours?

(Testimony of Oscar Wiseman.)

The Witness: Yes, it was a syrup product.

The Court: Was that the chief complaint?

The Witness: That was the complaint against those companies. We didn't care about them marketing any product. We didn't want the public misled and didn't want them to simulate our product.

The Court: They were getting out a product like yours and you didn't like it?

The Witness: Yes.

The Court: Go on. In getting into these things, they are going to be vague and the court has to ask questions. That illustrates why I ask questions. I am keeping an eye on what I am going to read later and I want to know what it means.

Mr. Maiden: I appreciate your Honor's interest and injection.

Q. (By Mr. Maiden): Mr. Wiseman, will you tell the court what the amendment was to be made to the application then on file?

The Court: Is this federal or state?

Mr. Maiden: This is federal.

The Witness: Federal. The change was from the [476] 1905 registration to the 1920 registration. And also we amended it to keep the requirements of the 1920 Act. The trade-mark had been in continuous use for one year to the time of the filing of our amendment.

The Court: Does the amendment say that?

The Witness: Yes.

The Court: Does the document speak for itself?

The Witness: I would say so.

(Testimony of Oscar Wiseman.)

The Court: Does it have to be explained? I would like you to explain what has to be explained, if necessary.

The Witness: The only explanation that I think should be given is the discussion that I had with Mr. Dunlap and possibly some of the discussion I had with Mr. Lauerhass regarding these various steps we took.

The Court: What was that?

The Witness: Well, there was a discussion with Mr. Dunlap.

The Court: When?

The Witness: At the hotel, the early part of the evening of November 27th.

The Court: Yes.

The Witness: It started off as a very heated conversation.

The Court: These applications for amendment were made at about the time of the [477] conference?

The Witness: They had been done prior to that time.

Mr. Maiden: This amendment, your Honor, was in July of 1942.

The Court: What are you talking about? Now you are getting away from your questioning. These are going to be offered as exhibits, are they?

Mr. Maiden: Yes.

The Court: May I look at them, please?

Mr. Maiden: Yes. I am going to offer them as exhibits.

(Testimony of Oscar Wiseman.)

The Court: Where is the other one? Is there another one? Is there just one?

Mr. Maiden: That is all, just that file. (Indicating.)

The Court: Is there any objection to this?

Mr. Mackay: No, your Honor.

The Court: It will be received as Respondent's Exhibit V.

The Clerk: That is V.

(The document above referred to was received in evidence and marked Respondent's Exhibit V.)

The Court: Mr. Clerk, may I have Respondent's Exhibits O and P?

The Clerk: Yes. [478]

Q. (By Mr. Maiden): Mr. Wiseman, I will ask you if you will examine Respondent's Exhibits O and P, and state whether or not you have ever seen those documents?

A. Yes, I have seen them before.

Q. Will you explain what Respondent's Exhibit P is?

The Court: How were those offered in evidence, were they offered through this witness?

The Witness: No.

Mr. Dunlap: Through me, your Honor.

The Court: Through Mr. Dunlap?

Mr. Maiden: Yes.

The Witness: This is really part—the Exhibit O is really a part of the November 28, 1942, agree-

(Testimony of Oscar Wiseman.)

ment. Exhibit P was a proposed draft of the actual assignment to be recorded with the patent office, of the trade-mark.

There was a proposed draft presented to me by Mr. Dunlap, which we did not accept. I prepared Exhibit O which we did sign and which they did accept.

Q. (By Mr. Maiden): Did you ever prepare any other assignment than Exhibit O?

A. So far as I know, no. That is the one I prepared and they accepted it in that form.

Q. Exhibit P then was not acceptable and was not [479] executed by Vita-Food Corporation?

A. I rejected that and told Mr. Dunlap what we would sign and we prepared it and presented it to him. He accepted it and I signed it, and they accepted it.

Mr. Maiden: Take the witness.

Cross-Examination

By Mr. Mackay:

Q. Mr. Wiseman, do I understand you to say that it was the Rice Laboratories that were trying to simulate the product, the label?

A. I believe that was the name of the company.

Q. It is not important what company. A company was trying to simulate the label?

A. Yes.

Q. They didn't use the name of Stuart Formula or anything to indicate Stuart Formula?

A. No, Stuart was not in there.

(Testimony of Oscar Wiseman.)

Q. It was just a label they were simulating?

A. It was something or other formula.

Q. Principally it was the label they were trying to simulate? A. Yes.

Q. You were very much concerned about the label?

A. I was, and the Stuart Company——

Q. The Stuart Company was concerned about the label [480] and you were? A. Yes.

Q. So you had them desist?

A. That is right.

Q. That label was quite important in the eyes of The Vita-Food Corporation at that time, that particular time? A. It certainly was.

Q. And you wanted to preserve the label?

A. Yes.

Q. Now, I call your attention to Exhibit V, to what is called "Petition and Statement", and at the top of that it has just "The Stuart Formula", on a blue paper? A. Yes.

Q. Now, I will ask you if the label which had been used had been submitted to the Commissioner of patents? A. I don't know.

Q. You prepared the application, didn't you?

A. No, I didn't prepare the original application.

Q. Did you prepare the amended application?

A. Yes, I did.

Q. Do you know whether or not you submitted the label to the Commissioner of patents?

A. I believe what I submitted was this part which is shown here (indicating).

(Testimony of Oscar Wiseman.)

Q. That is all you submitted, just what you took off, [481] the part of the label—just the top of it bearing "The Stuart Formula" and submitted that, and that alone? That is right, isn't it?

A. That is right.

Q. If you had submitted the entire label which you defended against the Rice people, which I show you now, which is Exhibit 9, do you think the Commissioner of patents would have granted your application? A. I don't think so.

Q. That is because that shows the label was the label of the Stuart Company? Wouldn't that be a fact? A. No.

Q. That would be one of the reasons why?

A. No.

Q. All right. Well, I ask you this: "The trade-mark has been continuously used and applied to said goods, in Applicant's business since April 5, 1941?"

A. Yes.

Q. Now, is that trade-mark, if you submitted it to the Commissioner of patents—I mean just that top you see on Exhibit V that I point to, bearing only "The Stuart Formula"—to your knowledge did the Vita-Food Company ever sell any goods bearing just that particular portion of that label?

A. Yes, it did. [482]

Q. Just that one portion of that label?

A. No, not with that portion; the entire label with that as a part of it.

Q. Now, Mr. Wiseman, I think you stated yes-

(Testimony of Oscar Wiseman.)

terday that when you had some conversation with Mr. Dunlap——

A. May I explain that last answer further?

Mr. Maiden: What answer do you want to explain?

The Court: Mr. Mackay is cross-examining the witness. You may continue asking the question you just started to ask.

Mr. Mackay: Thank you, your Honor.

Mr. Maiden: I want the witness what he had in mind clear so I can get his explanation on redirect examination.

The Court: Read the last question.

(The record was read.)

The Court: Do you want to finish your question?

Q. (By Mr. Mackay): ——that there was discussion there with respect to the quality of product? I think you stated that after that conversation you went over to the plant and examined it.

A. No, I had heard such mutterings and I knew such assertions had been made. Long before I went into that——

Q. I know.

A. ——that meeting, I had made my own personal investigation. [483]

Q. When did you make your personal investigation?

A. Oh, I made my first visit to the plant, I think, in the summer of 1941.

Q. I see. Where was the plant located then?

A. In South Pasadena.

(Testimony of Oscar Wiseman.)

Q. Where? A. On Fremont Street.

Q. Where on Fremont Street?

A. I don't know the number. It was near——

Q. What block?

A. Near Huntington Drive on Fremont.

Q. What block?

A. It was really in two blocks.

Q. What blocks? Can you give the two blocks?

A. Yes. It was the—the plant proper was on the northwest corner of Fremont and Huntington Drive.

Q. Is that a commercial area?

A. In a commercial building, yes.

Q. What is surrounding the building, what kind of businesses?

A. As I recall it, the building was a rectangular building on that southwest corner, and the corner store was a drugstore and then there was—there were one or two intermediate stores, and then the plant was an L shaped space, which was really the south part of the building, and [484] west part of the building.

In other words, the plant really took up the—an L shaped form around the other stores in the rectangle.

Q. Was that a new building at that time?

A. No, it wasn't a new building.

Q. Do you know what use that building had been put to prior to that time? A. No, I do not.

Q. Don't you remember it was used as a cat and dog hospital?

A. I am sorry, I don't know. The other building

(Testimony of Oscar Wiseman.)

where the laboratory was located was on the opposite side of the street in a building on the north side of Huntington Drive and facing on Fremont.

Q. Well now, Mr. Wiseman, you went in the plant to make an inspection. I think in your testimony you said you saw some electric agitators operating in vats? A. Yes.

Q. Or cylinders. What did you say? Do you remember what you said with respect to that?

A. I don't remember exactly. I saw a number of big vats, 100 to 200-gallon capacity, with agitators driven by electric motors, that looked something like a milk shaker you see on a soda fountain, only they were, of course, very much bigger. [485]

Q. Did you make an inspection to determine how many quality controls they had?

A. Yes, I made an inspection regarding that.

Q. How many quality control checks did they have? A. I don't know, I don't recall.

Q. Was the building air-conditioned?

A. I don't recall.

Q. Did it have any machinery to purify the air?

A. I don't recall that.

Q. Do you know whether or not they had any checks there for rodents, rodent inspection?

A. I don't know that. All I can say is it was a clean, sanitary place.

Q. Just like a clean house would be?

A. It was as clean as the average kitchen.

Q. You don't know how many quality controls they had, either physical or chemical?

(Testimony of Oscar Wiseman.)

A. Yes, I do.

Q. How many? A. Well,——

Q. At that time.

A. There were three men in the laboratory who were graduate chemists who were there and made test samples every day.

Q. Where was that laboratory you are talking about [486] now?

A. It was on Fremont Street, on the east side of Fremont Street, and just north of Huntington Drive.

Q. How far away from the building you described before?

A. Oh, I would say about 250 feet, maybe 300 feet.

Q. Well, was the Pacific Right-of-Way between them?

A. Yes. You mean the Pacific Electric to Huntington Drive?

Q. Yes. A. Sure.

Q. Did the company at that time have a registered pharmacist on duty?

A. I don't believe so. I believe that what they had were some chemists who were connected with Cal Tech, who spent part of their time, part time there. Some of them formerly had been with Cal Tech, who spent all their time in the laboratory. I did know that Dr. Borsook was a consultant and would occasionally check the laboratory. I don't know personally that he would check the plant, but

(Testimony of Oscar Wiseman.)

I do know he checked the laboratory. I think Dr. Borsook took me through the laboratory.

Q. Now, Mr. Wiseman, I think you stated on direct examination that Mr. Hanisch had offered to purchase the trade-mark for $100,000.00. Am I correct in that understanding? [487]

A. That is what Mr. Dunlap told me.

Q. When did he tell you that?

A. I believe in that second meeting at the Town House, that he mentioned that—from somewhere between $80,000.00 and $100,000.00, I believe, is what he said.

Q. Your statement yesterday, when you told the court Mr. Hanisch had offered you that, is not true, is that what you mean? Or you were mistaken, I should say.

A. I don't know what I did state at that time, exactly.

Q. Did you ever hear——

A. Any offer that Mr. Dunlap made, so far as I was concerned, was an offer by Mr. Hanisch.

Q. Isn't it a fact that during these negotiations that the only time that you talked to Mr. Hanisch was in the presence of Mr. Dunlap, and that was in a conversation that took place on November 27th and 28th and also November 22nd?

A. Yes,—well, I had met Mr. Hanisch before.

Q. I know, but I am talking about this. You had known him a long time?

A. Yes. When we were talking——

Q. Did Mr. Hanisch ever tell you after these ne-

(Testimony of Oscar Wiseman.)

gotiations started, did he ever tell you or offer to you or The Vita-Food Corporation to purchase the trade-mark? A. Yes.

Q. When did he offer? What conversation [488] was that?

A. He offered it in that Sunday meeting.

Q. What date was that? The Sunday, is that the 22nd?

Mr. Dunlap: Yes.

Q. (By Mr. Mackay): Mr. Dunlap was there at that time? A. Sure, he was there.

Q. You are absolutely sure of that, are you?

A. Certainly. Mr. Hanisch—as a matter of fact, when Mr. Hanisch was present——

Q. Just——

Mr. Maiden: Let him answer.

The Witness: He conducted the principal discussion on their side, Mr. Hanisch did the talking.

Q. (By Mr. Mackay): I understand that. Now are you sure that it was in the conversation of November 22nd when Mr. Hanisch made you that offer?

A. No. I think that offer was made in the previous meeting by Mr. Hanisch through Mr. Dunlap. I think that the figures we were talking about at that Sunday meeting were in the neighborhood of $150,000.00.

Q. You are not quite sure Mr. Hanisch ever made you an offer of $100,000.00 or made an offer to purchase the trade-mark?

A. Directly, no; through Mr. Dunlap, yes. [489]

(Testimony of Oscar Wiseman.)

Q. Now, do you remember just what the nature of the conversation or the substance of the conversation you had in that last meeting was? I will withdraw that.

Isn't it a fact, Mr. Wiseman, that the first conversation—or the second conversation—I will withdraw that.

Isn't it a fact that your conversation with Mr. Dunlap on November 22, 1942, and your conversation with Mr. Dunlap on November 28, 1942, and including the 27th, that those conversations were related principally to the settlement of the controversies that existed between The Vita-Food Corporation and The Stuart Company arising out of the contract of May 5, 1941? A. No.

Q. No?

A. No. Would you like me to explain that answer?

Q. Just a moment. You can have an explanation on redirect. Was anything said at the conference of November 28th, 1942,—I should say November 27 and 28, 1942—with respect to releases of the parties, respective party's release from obligation by virtue of the contract of May 5, 1941? A. Yes.

Q. That was an important subject at that time?

A. Oh, yes. We discussed it, sure.

Q. Now, you stated a moment ago, I think, Mr. Wiseman, [490] that in your opinion it was your belief at your last conversation you had with Mr. Dunlap and Mr. Hanisch on November 27th and 28th that the entire consideration of $197,700.00,

(Testimony of Oscar Wiseman.)

specified in this agreement of November 28, 1942, was intended to be in consideration for the sale of the trade-mark? A. Yes.

Q. At that time there was pending, wasn't there, by you, by the Vita-Food Corporation, against The Stuart Company—The Stuart Company had given The Vita-Food Corporation a notice of recision of the contract, hadn't it? A. Yes.

Q. You knew that Mr. Dunlap had prepared or was in the course of preparing a complaint which alleged fraud with respect to certain representations or misrepresentations made at the time of the signing or entering into the contract of May 5, 1941?

A. Yes.

Q. Now, do you mean to tell this court, with all those things pending at that particular time, the controversies pending between the two parties, you really mean to tell this court the entire consideration of $197,700.00 was paid just for the [492] trade-name?

A. Yes, I mean to say that. And, as I told Mr. Dunlap and Mr. Hanisch at the time, the rest of these claims and rescision action was so much eye wash. I told them that with emphasis. I certainly do feel that the only thing that was under discussion, that permitted any discussion was the trade-mark, and I so told Mr. Dunlap and I so told Mr. Hanisch.

Q. You acquired a high respect for Mr. Dunlap's position in Pasadena, as a lawyer?

A. Yes, Mr. Dunlap and I exchanged compliments, particularly at the meeting at the hotel where

(Testimony of Oscar Wiseman.)
he congratulated me on a complaint I drew in a conjunction case.

Q. You don't mean to infer Mr. Dunlap wasted all his time drafting complaints, unless he believed he had some grounds for his claims, although you may have disagreed with him?

A. He was putting a bold front on, after they were in default, and he was trying to build—I told him he was building a lot of straw men here and I wasn't impressed with them. I wasn't willing to discuss the case on a so-called basis of any so-called fraud on a rescision. I told him I didn't like the fact he gave me a 48-hour ultimatum, and we had answered that by filing the suit. I was thoroughly prepared to meet him in court or any place else on the case.

I also told him that apparently he had been [492] practicing law a good many years more than I, but that I had lost a part of my amateur standing and I had rendered my opinion that there was no question about the legal rights to the trade-mark, and I just wasn't prepared to discuss it at all. As far as I was concerned, we had filed our law suit in answer to the ultimatum of theirs and we would discuss it before a tribunal where these things could be determined. We had started and we were prepared to go through with it.

Q. That suit was pending and you intended to go through with that suit you filed. You filed the suit believing it to be of some value. Now, wasn't any

(Testimony of Oscar Wiseman.)

part of the consideration paid for the dismissal of that suit? A. No.

Q. Not a bit?

A. No. All the suit was was to protect our rights in our property, which was the trade-mark.

Q. Now, Mr. Wiseman, I will call your attention to Exhibit 12. Just a moment, before you begin to examine that, Mr. Witness. You have been in practice for quite some time, haven't you?

A. I started practicing law in 1932.

Q. In 1932? A. Yes.

Q. You have practiced ever since that time?

A. I was out of practice for substantially two and a [493] half years, from 1942 to the end of 1945 —1943 to 1945.

Q. Anyway, you have had enough experience to know what a sales contract is, haven't you?

A. Yes, I think so.

Q. As a lawyer you would admit, I would think, if a person entered into a sales contract that if you were drawing a contract up for selling some property the seller would agree to sell and the buyer would agree to buy? That would be the usual thing, wouldn't it? A. Yes. If you want——

Q. Wait a minute. A. All right.

Q. I will ask you to examine Exhibit 12 and point out to the court any terms in that agreement wherein the Vita-Food Corporation agrees to sell the trade-name or anything else. Take your time, Mr. Witness. A. Well——

The Court: We will take a recess.

(Testimony of Oscar Wiseman.)

(Short recess taken.)

The Court: Proceed, Mr. Mackay.

The Witness: May I also see Exhibit P? I think that is the one which was the assignment, which goes with this.

Q. (By Mr. Mackay): Well, yes, I don't mind you seeing that if you wish.

The Court: You mean Exhibit O? [494]

The Witness: Yes, I mean Exhibit O, your Honor. Thank you. In Paragraph 2 we quitclaimed the trade-mark. That is language of the sale and transfer of the title. Then in Paragraph 6 and in Paragraph 7 there are provisions for reversion of title, which constituted an agreement of conditional sale.

Then also there is a covenant in here to execute the assignment which is Exhibit O, which is the actual transfer of title and which recites that Vita-Food sells, transfers, and assigns and so forth.

Q. (By Mr. Mackay): So those are the terms of the instrument which you say, in your mind, designate—I mean constitute an agreement on the part of The Vita-Food Corporation to sell the trade-mark?

A. Yes, I think from reading the four corners of the instrument, it can only be interpreted as a conditional sales contract.

Q. Now, refer to paragraph 2, Mr. Wiseman, which provides, "third party quitclaims without warranty (except that it does warrant that it has not heretofore conveyed, assigned, or encumbered any

(Testimony of Oscar Wiseman.)

right therein) to second party the trade-mark 'the Stuart formula'. The third party agrees to execute appropriate assignments, if requested, of registrations on file with the Secretary of State of the State of California [495] and the U. S. Commissioner of Patents." A. Yes.

Q. Now, you agreed to that language, didn't you? A. Certainly.

Q. You signed the contract?

A. Yes, I did.

Q. The request wasn't made for these assignments until after four and a half months afterward, were they? I refer you to Exhibit O.

A. The request was made at the time——

Mr. Mackay: Just a moment. May I have that request? I think it is Exhibit M.

Mr. Dunlap: M or N. It is a letter, your Honor, over my signature.

The Court: What is the letter about?

Mr. Dunlap: A letter of April 15, 1943.

The Court: Here it is.

Q. (By Mr. Mackay): I show you Exhibit N. Isn't it a fact that is the first request that The Stuart Company ever made on The Vita-Food Corporation for an assignment? A. No.

Q. Now, I will ask you, Mr. Wiseman, as a lawyer, if you intended to make a deal for your client for the sale of the trade-mark for a total consideration of $197,700, do you [496] think you would have used this language in Paragraph 2 that an assignment would be made if requested?

(Testimony of Oscar Wiseman.)

A. Well, that language is actually Mr. Dunlap's, but I agreed to it. I see no reason why that language should not be used again in a similar case. The point was made quite clear and we all agreed that we would make an assignment in proper form so that the trade-marks of record with the Patent Office and with the California Secretary of State would show of record the ownership by Stuart Company, and that it was understood and agreed that any time they wanted it they could have an appropriate assignment.

The fact they did not formally request it or present a form until later made no difference to me. We knew that sooner or later, whenever they got around to it, we would execute appropriate assignments to be recorded with the respective public authorities.

Q. You did agree, though, and you were the one that signed this contract as Vice-President of Vita-Food? A. Yes.

Q. You did agree that you would execute the assignment if requested?

A. Yes. And we were requested then. They said "We will get it to you, we have got other things to do." Mr. Dunlap was doing the typing. We didn't have a typist, or anything. [497]

Whenever they—it could have been the next day —as a matter of fact, I was a little surprised they didn't arrange it sooner.

Q. Now, Mr. Wiseman, the contract further states, and I call your attention to Paragraph 7 to which you just referred, that "in the event of the

(Testimony of Oscar Wiseman.)

abandonment of said trade-mark 'the Stuart formula' by second party—'' then I am skipping something—that 'the Stuart formula' would vest in the Vita-Food Corporation.

Q. There was talk then, wasn't there, about abandoning the trade-mark? A. Yes, there was.

Q. So that in two days after the contract had been executed The Stuart Company had abandoned the trade-mark, that would then immediately become the property of Vita-Food Corporation?

A. Yes.

Q. Without any consideration at all passing from the Vita-Food Corporation? A. Yes.

Q. You mean to tell this Court that a trade-mark, if it is worth $197,700.00 on November 28, 1942, it is a sensible interpretation of this contract, if that trade-name would have been abandoned the next day, that valuable trade-name, in your mind, would have come back to you without any [498] further consideration?

A. Yes. We would have been able to keep the payments made up to that time. But I doubt very much whether or not we could have collected additional balances. In other words, we wanted our money or we wanted the trade-mark back; just like you would have on any conditional sales contract.

Q. The contract was a definite obligation on the part of The Stuart Company to pay $197,700.00, irrespective of the abandonment, wasn't it?

A. Well, I would have to think that over. [499]

Q. Read the contract. I refer you to Paragraph

(Testimony of Oscar Wiseman.)

4 and ask you if that isn't a definite commitment on the part of The Stuart Company to pay $197,700.00, irrespective of the fact that it maintained "the Stuart formula" or abandoned it.

A. Yes, Paragraph 4 contains an unconditional promise to pay. However, with regard to abandonment, that is contained in Paragraph 6 here, and I would want to read it.

Q. Take your time.

The Witness: Would you mind reading the question?

(The question was read.)

Q. (By Mr. Mackay): Do you understand the question? A. The answer is no.

Q. Is that because I said $197,700.00? I should have said $122,700.00.

A. I am not concerned about the exact amount. Paragraph 4 is an unconditional promise to pay. Paragraphs 6 and 7—Paragraph 7 only provides for the event of abandonment, and the contract does not have a clause that the remedies of the seller are cumulative. So, in my opinion, we had the right to insist on the balance, on the one hand, or to retain the property, in the event they did abandon it. I believe you asked for my opinion.

Q. May I ask you this question: The contract, in your [500] opinion, doesn't the contract provide this $122,700.00 shall be paid at the rate of 7½ cents a unit whether sold under "the Stuart formula" or not?

(Testimony of Oscar Wiseman.)

A. That is right. It is an unconditional promise to pay. But, on the other hand, the contract does not provide for cumulative remedies. If we retook the property, in my opinion, we would not have the right to collect any balances then unpaid at the time we took it back. We would have the right to our money or the property.

Q. You knew at the time that Mr. Hanisch and The Stuart Company had some discussions about abandoning the trade-mark?

The Court: May I just interrupt you there?

Mr. Mackay: Yes, your Honor.

The Court: Mr. Wiseman, if the contract of sale were entered into and one party failed to pay the money consideration, the contract to sell the property, and one party failed to pay the money consideration for the purchase of the property, what would be the remedy of the seller?

The Witness: We could declare the entire balance due or retake.

The Court: You wouldn't have to have any clause in a contract about that at all, would you? Now, if, under this contract, you have here, there is a provision that if The Stuart Company should abandon the trade-name it would [501] return to The Vita-Food Corporation.

The Witness: Yes, your Honor.

The Court: That clause is there in a separate clause?

The Witness: Yes.

The Court: Under your contract that clause

(Testimony of Oscar Wiseman.)

would operate even though The Stuart Company might pay the full cash consideration called for by that contract, that is, they were to pay something like $167,000.00 in full, and they could pay $167,000.00 in full, abandon the use of that trade-name, and it would revert to The Vita-Food Corporation, that is to say,—may I see the contract?

The Witness: Surely.

The Court: Would you take this into consideration: That Clause 7 says, "In the event of the abandonment of said trade-mark 'the Stuart formula' by Second Party—" that is in the disjunctive—"of the insolvency or bankruptcy of the Second Party the trade-mark 'the Stuart formula' and all registrations thereunder shall vest in and be the property of the First Party."

Now, I would like your opinion on this: You have been asked to give your opinions on several points about this contract. Supposing that three years from now The Stuart Company should abandon the trade-name "the Stuart formula", under Clause 7 wouldn't that trade-name revert to Vita-Food Corporation? [502]

The Witness: No. Those are security clauses, to provide, in the event of default. It was never the intent—if they paid their money they were entitled to it. If they didn't pay their money or abandoned it, we got it back.

The Court: That was your interpretation?

The Witness: Yes, that is what we intended.

(Testimony of Oscar Wiseman.)

The Court: Who asked to have the clause inserted for abandonment?

The Witness: I did.

The Court: Into Clause 7?

The Witness: Yes.

The Court: Mr. Mackay.

Mr. Mackay: Yes, your Honor.

Q. (By Mr. Mackay): Now, as I started to ask you, there had been some discussion by Mr. Hanisch and you and Mr. Dunlap regarding the abandonment of the trade-mark.

A. Yes, there was considerable discussion about that, before that was inserted.

Q. And yet you mean to tell this Court, in view of those discussions and in view of the fact you put that in there yourself, that the total consideration of $197,700.00 was paid for that trade-mark.

A. I do. The matter of the abandonment was simply to secure us in the event they did that particular act. We [503] wanted our money or we wanted the trade-mark back.

Q. Wasn't it important, so far as you were concerned as an officer of the company, for Mr. Hanisch to stay in the picture as managing agent?

A. It certainly was.

Q. And that was because of his ingenuity and super-salesmanship, wasn't it?

A. No, I didn't know very much about that. That was because Mr. Hanisch personally told me—Mr. Dunlap told me he had put in about $60,000.00 into the company by way of loans and the company had

(Testimony of Oscar Wiseman.)

no assets and it was indebted to Mr. Hanisch. If he was not bound by the agreement, it wasn't worth two cents. We wanted him bound and wanted him to stay there.

Q. The agreement with the company would not be worth two cents?

A. Agreement by The Stuart Company to pay $200,000.00 on that date would have been an entirely worthless promise.

Q. Would it have been after that?

A. Pardon me?

Q. Would it have been after that?

A. I don't really know how well or how badly The Stuart Company has done since. I understand they have done very well.

Q. This contract was supposed to run over a period of [504] time. There are payments to be made over a period of years under this contract of November 28, 1942.

A. What is your question?

Q. In your view, then, the contract wouldn't have been worth a thin dime unless Mr. Hanisch had been kept in there as the managing agent and maintained his ownership in stock.

A. As far as I was concerned, The Stuart Company was the mere agent of Mr. Hanisch; unless he directly promised in this agreement we were not interested in making any deal whatsoever.

Q. I see. Do you know who the stockholders of The Vita-Food Company were when it was organized? Or I mean about May 5, 1941.

(Testimony of Oscar Wiseman.)

A. No, I don't.

Q. Were you a stockholder?

A. Not May 5, 1941.

Q. Did you ever send out any notices of meetings of stockholders? A. I don't recall now.

Q. Are you a stockholder now?

A. No, I am not.

Q. Were you a stockholder subsequent to that time? A. Yes, I was.

Q. Did you have any idea who the stockholders were [505] of The Vita-Food Company May 5, 1941?

Mr. Maiden: He just stated he didn't.

The Witness: I have an idea who they were.

Q. (By Mr. Mackay): Who were they?

A. I believe the stockholders then were Mr. Overton, Mr. Shotland, Mr. McBride and Mr. Lewis. There might have been one or two others; I can't recall now. I think those were some of the stockholders at that time.

Q. Now, do you remember receiving two checks at the Vista Hotel from Mr. Dunlap on November 27th?

A. I know that I got at least one or two checks that evening. I don't remember who handed it to me.

Q. Isn't that the reason Mr. Dunlap called you, to give you these checks for orders that had been placed?

A. He mentioned that as a reason he had called me, one of the reasons.

Q. There had been some controversy about the payment, hadn't there?

(Testimony of Oscar Wiseman.)

A. Oh, yes. I told him we would be glad to fill the orders.

Mr. Mackay: You may take the witness.

Redirect Examination

By Mr. Maiden:

Q. Mr. Wiseman, do you recall now what explanation [506] you wanted to make in connection with some answer you gave to one of Mr. Mackay's questions?

I was afraid of that. We will have to pass it.

A. I might remember it if you give me a moment. Oh, yes. I think I remember the explanation I wanted to give, in connection with the preparation of the amendment under the 1920 Act. I called for evidence, what evidence there had been that shipments had been made in interstate commerce. I was shown some of the business records of the company and some correspondence where some pilot shipments had been made, I believe, by mail. One was to Chicago, as I recollect, and one some place else. I satisfied myself that there had been some shipments in interstate commerce a year or more prior to the time we filed the amendment.

Q. Now, Mr. Wiseman, coming to this agreement of November 28, 1942, whose language in this contract would you say—from whom would you say the bulk of the language in this contract came, you or Mr. Dunlap? A. Mr. Dunlap.

Q. Was there anything said there that night by

(Testimony of Oscar Wiseman.)

Mr. Dunlap with respect to the tax consequences of the transaction?

A. Yes, that was thoroughly discussed.

Q. Tell the Court whether or not you had any impression with respect to the particular wording of the contract [507] by Mr. Dunlap.

Mr. Mackay: If the Court please,——

The Court: Read the question.

Mr. Mackay: ——I object to that as calling for a pure conclusion. I don't mind the witness——

The Court: Objection sustained.

Q. (By Mr. Maiden): By the way, Mr. Wiseman, did Mr. Lewis call you on the telephone or did you call Mr. Lewis on the telephone at any time during the night? A. I called him once.

Q. Do you recall what the purpose of the call to Mr. Lewis was?

A. I think it was about 3:00 o'clock in the morning. I told him what looked like the final offer, if there was going to be a sale, would be at $200,000.00, and I wanted his views on whether or not he thought that was adequate.

Mr. Maiden: I believe that is all, if the Court please.

Mr. Mackay: No more questions.

The Court: You may step down.

The Witness: May I be excused, your Honor?

The Court: May the witness be excused?

Mr. Mackay: So far as we are concerned.

Mr. Maiden: If the Court please, I do want to ask [508] Mr. Wiseman this question:

(Testimony of Oscar Wiseman.)

Q. (By Mr. Maiden): Mr. Wiseman, I call your attention to Exhibit—it looks like Exhibit G, Respondent's Exhibit G, a letter dated December 9, 1941, which was from The Stuart Company to The Vita-Food Corporation. I will ask you if this letter explains the protection by The Stuart Company of some alleged infringement by the two companies that you testified to.

A. Yes, it does. This corrects me. The name of that company that was infringing was the Rite Laboratories.

Q. It was in response to this letter you took the action you testified about?

A. Yes, I talked to Mr. Lauerhass after that letter came in.

The Court: You are referring to Exhibit G, is that correct?

The Witness: Yes.

The Court: All right.

Mr. Maiden: That is all.

The Court: I will ask counsel for the Respondent the name of his next witness, because I don't know whether to excuse the present witness or not.

Who will be your next witness?

Mr. Maiden: It will be Dr. Borsook.

The Court: Are you calling Mr. Lewis? [509]

Mr. Maiden: Yes, your Honor.

The Court: Then I think you will have to stay, Mr. Wiseman. I guess we will go right ahead. We will be finished today, if you can just stay with us a little longer.

(Witness excused.)

Mr. Maiden: Dr. Borsook.

Whereupon,

DR. HENRY BORSOOK

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please, Doctor.

The Witness: Henry Borsook.

Direct Examination

By Mr. Maiden:

Q. Dr. Borsook, what is your present occupation?

A. Professor of biochemistry at The California Institute of Technology.

Q. How long have you occupied that position?

A. I have been at Cal Tech since 1929. I have been staff professor since 1935.

Q. Dr. Borsook, will you please briefly give us your educational background, relating to your position that you hold at Cal Tech?

A. Well, I took a Bachelor's Degree, majoring in [510] physiology and biochemistry at the University of Ontario in 1921, PHD 1924, MB, which is the equivalent of a mere MD in 1927. That was changed for convenience for living in America to MD in 1940.

Q. An MD, that is a doctor of medicine?

A. Yes.

Q. You likewise have your PHD in what field?

(Testimony of Dr. Henry Borsook.)

A. Biochemistry.

Q. Dr. Borsook, will you briefly tell the Court what positions you hold on any government or state boards or committees or commissions?

A. At the present time?

Q. At the present, and what positions you have held in the past.

A. Well, at the present time I am a member of a committee of the National Research Council concerned with the feeding of industrial workers.

I am a member of the committee of the Atomic Energy Commission. During the war years I was a member of the Food and Nutrition Board. I was a consultant to the War Production Board and to the War Food Administration.

Q. Doctor, in your years in the field of biochemistry, tell the Court whether or not you made any particular study with respect to vitamins.

A. My studies with respect to vitamins were in part [511] clinical, that is, their effect on human beings suffering from various elements, in part chemical; the chemical behavior of certain vitamins.

Q. Have you written any books on vitamins, Dr. Borsook?

A. I published a book on vitamins called by that name.

Q. Called by that name? A. Yes.

Q. Dr. Borsook, how long—or do you know a Mr. Hanisch?

A. Well, my acquaintance with Mr. Hanisch be-

(Testimony of Dr. Henry Borsook.)

gan very short before—a matter of not more than a month or two—it is difficult for me to remember the exact time, but certainly shortly before Mr. Hanisch came into this company which eventually marketed "the Stuart formula."

Q. Dr. Borsook, how long have you known Mr. M. H. Lewis? A. About 15 or 16 years.

Q. Will you tell the Court whether or not you had been making any studies there at Cal Tech with respect to vitamins and vitamin concentrates? Tell the Court what work you have been doing and what you had in mind, if you have.

A. From about 1931 onwards I began with the assistance of several doctors, who were practicing medicine, the possible [512] usefulness of vitamin concentrates in certain ailments, common ailments, and in the course of those studies it was clear that we needed badly—by "we" I mean the community—vitamin concentrates that would be cheap and palatable, because in those days they were dear and they weren't very good. It was early in the game.

Those studies went on all through the '30's. Then when the war clouds began to roll up—we were not at war—about a year and a half before we were at war the faculty of Cal Tech met and decided, in view of the international situation, that each one of us would try to find out in what way we thought we could contribute to the national effort, even if it meant abandoning our previous scientific work.

After a good deal of discussion among ourselves we thought probably in the field of nutrition, applied

(Testimony of Dr. Henry Borsook.)

nutrition, we could do this. Not long afterwards I discussed it with Mr. Lewis, whom I saw off and on a good deal all through those years.

Q. What was the occasion of your seeing Mr. Lewis?

A. We were friends. We met from time to time. I knew of his interest in public affairs and his interest in Cal Tech and his great concern about the war, so that I knew he would be interested in this decision of both the faculty of Cal Tech and ourselves. I called him up, and as friends [513] do, he came one evening and we talked it over.

At that time he volunteered his assistance, which we gladly accepted because what we had in mind and eventually carried through was a memorandum to various government officials and international reserve council on the proper utilization of food in the war, both by the civilian and military population, and also for people who were under great strain that might need supplementation.

Well, the preparation of that memorandum took, if my memory is correct, about six months. It was a long arduous task.

Q. Did Mr. Lewis participate in any way?

A. He participated in a very intimate way and continuously, and made very great contributions.

Q. Did you receive any compensation for that?

A. None whatsoever. He is a very penetrating critic. He knows the ways of government procedures, which we didn't. He also had friends there. At the end that memorandum was sent, in June, 1940, if

(Testimony of Dr. Henry Borsook.)

my memory is correct, to Washington. I should say that Mr. Lewis' contribution to the presentation as it was written, and to the manner in which it was handled, was of very great importance and of very great value.

Q. Did that memorandum form the basis for any inquiry received by you from any foreign emissaries?

A. Yes. If I may take the time of the Court for a [514] moment or two——

The Court: May I ask what the materiality of this is, please?

Mr. Maiden: I am just sort of trying to get a little bit of the background. I am going to hurry it through.

The Court: Background of what?

Mr. Maiden: The background of this whole thing. We have got to start—have got to sort of have a starting point, and I think that in view of certain implications that have been made in the presentation of Petitioner's case with respect to misrepresentation of the quality of product and things of that nature, that this fits into the picture and leads in and shows good faith, shows soundness.

Q. (By the Court): Dr. Borsook, do you say that memorandum on nutrition was prepared at California Institute of Technology?

A. That is correct.

Q. Is that correct?

A. That is correct, your Honor.

(Testimony of Dr. Henry Borsook.)

Q. And it was sent to the National Nutrition Council?

A. No, to the National Research Council and——

Q. Where? A. In Washington.

Q. Is that in the government or not?

A. No, it has a peculiar relationship to the [515] government. It is outside the government and yet it derives some of its funds from the government.

Q. What was the title?

A. "Memorandum on National Defense."

Q. It was a memorandum on national defense?

A. Yes.

Q. Now, what was your main headings in that memorandum?

A. One, that we should try to get the armed forces to use the modern science of nutrition in the feeding of troops. Second, we should do the same thing for the civilian workers. We pointed out that could be done economically and effectively.

And third, the older men who had positions of great responsibility, both in civilian life and the armed forces, would need and benefit from nutritional supplements. And we pointed out that that might be done.

The Court: All right. Now, Mr. Mackay.

Mr. Mackay: I would like to say, if your Honor please, to cut this short, I will admit that Dr. Borsook is a distinguished gentlemen connected with one of the finest institutions in America, California Institute of Technology, if that will give sufficient admission for his background.

(Testimony of Dr. Henry Borsook.)

Mr. Maiden: I will speed along, if the Court please. [516]

The Court: I don't see the connection at all between this memorandum to the National Defense Council and the question in this case.

Mr. Maiden: Yes.

Q. (By the Court): You had assistance in the preparation of this memorandum?

A. Yes. Dr. G. E. Keighley, Dr. Ellis and Mr. Hatcher and Mr. Lewis.

Q. Are they all on the faculty?

A. No; Dr. Keighley is on the faculty of the Institute still. The other two gentlemen are not.

Q. They were?

A. Dr. Ellis was. Mr. Hatcher was a graduate student of mine.

Q. (By Mr. Maiden): Now, Dr. Borsook, will you explain to the Court what, if anything, you had to do with the preparation of the vitamin concentrates sold as "the Stuart formula"?

A. I was the consultant and adviser, scientific adviser. The formula as proposed by me was the basis of the preparation and the method of making it was worked out under my direction.

Q. Where was the work done?

A. At California Institute of Technology, in my laboratory. [517]

Q. Now, Dr. Borsook,——

The Court: Just let me ask you a couple of questions.

Mr. Maiden: Yes.

(Testimony of Dr. Henry Borsook.)

Q. (By the Court): Can you state whether there was some particular feature about your idea? Very often one idea is important in a formula.

A. I should say there was a general, shall we say, sociological idea. We wished to find a concentrate which was cheap enough for people with ordinary means to use, where abundance of supplies would be available.

Q. What made this cheap?

A. The use of materials like molasses. And at one time we felt we could use by-products such as yeast, which we later had to abandon.

Q. Is that the main idea, molasses?

A. No, no. The molasses was a vehicle and it turned out a fortunate choice, I should say.

Q. It was what?

A. A fortunate choice, because of unexpected properties it possessed, chemical properties.

Q. What were those?

A. It contributed to the stability of the vitamins.

Q. Yes.

A. For unexpectedly long times. To my mind then as [518] now the most important contribution was the formula itself. At that time it was not common knowledge, even among scientific people, what was really the best balance of different vitamins to include in a supplementary formula. There were a great many preparations on the market, of course, and they were bizarre in their composition.

Q. They were what?

A. Bizarre in their composition.

(Testimony of Dr. Henry Borsook.)

Q. In what way?

A. There were enormous amounts of, shall we say, Vitamin A or negligible amounts of Vitamin D or B. It was clear, and nearly all of them have extraordinarily small amounts of what we then called the Vitamin B Complex. Our studies indicated it was the deficiency of the Vitamin B Complex that was most needed.

Q. Was that a kind of multi-vitamin compound?

A. It was a multi-vitamin compound preparation.

Q. The idea is to compound several necessary vitamins to supplement the nutritional lapse, is that correct? A. That is correct.

Q. Now, you were working on this formula in what year?

A. I should say the formula itself was the result of studies which had been going on with myself directly since 1931.

Q. I mean just about when did you have this work [519] completed?

A. The completed, the laboratory in my mind——

Q. No. I mean completed in the laboratory so that these commercial people could use it.

A. We didn't undertake that work, although Mr. Lewis had suggested it, until the memorandum had been sent off, although we talked a good deal about it.

Q. I am asking you the year, please.

A. It would be 1940, toward the end of 1940.

(Testimony of Dr. Henry Borsook.)

Q. Toward the end of 1940? A. Yes.

Q. You had made, compounded the syrup in your laboratory, is that correct? A. Yes.

Q. With the multi-vitamin formula?

A. Yes, that is correct.

Q. Now, at the end of 1940, had other laboratories developed a multi-vitamin compound, using some other base or something else? Were there other multi-vitamin formulas on the market?

A. Yes, long before, years before this. But the formulas were to my mind unsatisfactory.

Q. You didn't agree with the formulas but there were multi-vitamin formulas on the market?

A. Oh, yes. [520]

Q. You didn't originate the multi-vitamin idea?

A. Oh, no.

The Court: I see. All right. Go ahead.

Q. (By Mr. Maiden): Dr Borsook, what connection, if any, did you have during the years 1941 and 1942 with the manufacture by The Vita-Food Corporation of this concentrate that is sold through The Stuart Company?

A. Certainly, you will have to excuse me if I don't remember the exact dates, because toward the end of the period you mentioned I terminated my connection.

The Court: Your connection with what?

The Witness: As a consultant to the Vita-Food Corporation.

The Court: About what time was that?

(Testimony of Dr. Henry Borsook.)

The Witness: My impression is it was toward the end of 1941, but I might be off, as happens.

The Court: Let me ask you this:——

The Witness: Yes.

The Court: ——had they put up this preparation during 1941?

The Witness: Oh, yes.

The Court: They had?

The Witness: I am sure of that.

The Court: They had put it up? [521]

The Witness: Oh, yes, yes, it was going.

The Court: It was under what name? What name were they selling it under?

The Witness: It went under a variety of names at first. I think it was Vitall, and then Mr. Charley King came in and sold it as Buoyant B and then eventually as "the Stuart formula."

Q. (By Mr. Maiden): Now, just what connection did you have with the manufacture by The Vita-Food Corporation of this concentrate during the period of time that you operated as a consultant?

A. Well, I supervised, discussed and had to be satisfied on everything that was done in a technical way. The three gentlemen whose names I mentioned did a good deal of the manual work in the early stages, and later on, of course, it was taken over by a regular production staff.

Furthermore, from the very beginning there was no difficulty about it, everyone agreed it was the sensible thing to do. We took samples and assayed

(Testimony of Dr. Henry Borsook.)

them and sent duplicate samples away, which we assayed at intervals so we could learn what the stability was of the different vitamins.

We were continually exploring new and better and cheaper sources of materials in order to make the product cheaper. That was my main interest in the thing. In fact, [522] my chief interest in it. And from time to time there were naturally with the development of a new product technical problems, procedural, on which I was consulted.

Q. Dr. Borsook, in your analysis of that product as it was being manufactured, how did it compare qualitatively with the vitamin concentrates then on the market?

A. By qualitatively you mean with respect to vitamin concentrate or what?

Q. I mean as to either excellence as a vitamin concentrate——

A. Well, I was definitely of the opinion, an opinion which I could have supported with facts, it was the best one in America. It was so designed to be so and at a cheaper price than any other in America. That was my only point in spending my time on it.

Q. Did anything occur to cause you to change your opinion as to that formula?

A. No. As a matter of fact, that basic pattern of vitamins was finally the basis of what is called the "Recommended Daily Allowances of the National Research Council."

I don't want to say I personally persuaded them.

(Testimony of Dr. Henry Borsook.)

It represents a consensus of opinions of experts over the country.

Q. Now, Dr. Borsook, there has been some testimony in this case regarding these bottles containing some of [523] Stuart formula exploding.

A. Yes.

Q. Did you make any investigation of that?

A. We made a great many investigations of that. That was a difficult problem. In fact, it was a problem that men I knew in the industry told me hadn't been solved and couldn't be solved. That if you worked in molasses you had an unsurmountable gas problem. That problem was finally solved.

Q. How about fermentation?

A. Never any fermentation. The gas problem was not a problem of fermentation. It was quite a different problem.

The Court: I think you will have to make your testimony clear on that. It has been testified here that the substance, the preparation got out of the bottles in some way.

The Witness: Yes.

The Court: Now, is that true?

The Witness: That certainly was true.

The Court: That was true?

The Witness: Yes.

The Court: And your explanation is that some gases developed?

The Witness: Yes.

The Court: And did cause the stopper to leave the [524] bottle?

(Testimony of Dr. Henry Borsook.)

The Witness: Yes.

The Court: So it is true that in 1941 and 1942 there was, I guess we could call it, a defect in the preparation?

The Witness: During the warm months.

The Court: During the war months?

The Witness: Yes, only during the warm months.

The Court: What period would that be?

The Witness: Roughly the summer.

The Court: During the warm months, w-a-r-m months?

The Witness: Yes.

The Court: Of the year.

The Witness: Yes.

The Court: I mean during what period in years, was it in 1941-1942, the time period in this case?

The Witness: '41.

The Court: It was 1941 and 1942?

The Witness: It was during the summer of 1941. By the end of '41 that problem was solved and did no longer give trouble, to the best of my knowledge.

The Court: If there had been any of this stuff on the market at the end of 1941 that problem might have developed in some stores in 1942? [525]

The Witness: If it was old stock, yes, sir.

The Court: If it was old stock?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Maiden): Dr. Borsook, will you explain how it is that you could use a molasses base and not have any fermentation?

(Testimony of Dr. Henry Borsook.)

A. I hope the Court——

The Court: He said fermentation——

The Witness: There was no fermentation, there never was.

The Court: The term "fermentation" was perhaps incorrectly used. Maybe that is a layman's expression. Instruct counsel what term he should use there.

The Witness: Gas formation. Fermentation is a development of carbon dioxide by yeast and bacteria. There was a gas formation as a result of known biological reaction, which was the problem.

Q. (By Mr. Maiden): I had reference to the testimony of Mr. Miller here that you couldn't use a molasses base because it would always ferment. Is fermentation and the formation of gas one and the same thing, Dr. Borsook? A. No.

Q. That is what I want you to explain, how it is you [526] could use a molasses base without fermentation?

A. Yes, sir. And very, very few micro organisms of any kind will grow and live in a sugar concentration as high as in molasses. You add a lot of water to the molasses and it will ferment merely in the highly concentrated form in which it was used. There is no biological action of that character. There was a chemical action of a non-biological character which gave rise to gas and that was the problem which the molasses is very familiar with. It is not a discovery, it is an old problem. Anyone expert in dealing with molasses distinguishes at once

(Testimony of Dr. Henry Borsook.)

between fermentation and this problem of gas formation.

Q. Below what percentages, that is, the pure molasses would fermentation occur?

A. You would have to add—I would want to consult the literature to give you precise figures. I will make a rough guess, to make that ferment and to be sure it will ferment you would have to add at least two parts of water.

Q. Now, Dr. Borsook, I will ask you to state to the Court whether or not this concentrate prepared by the Vita-Food Corporation, in accordance with your formula, met the Food and Drug Act requirements?

A. Yes, we were naturally careful to comply with the Food and Drug Act regulations.

Q. Now, Dr. Borsook, I want you to tell the Court [527] the occasion for your meeting Mr. Hanisch and in substance about what the conversation was.

A. That is very difficult. I remember the general set of circumstances under which I met Mr. Hanisch. As I mentioned, one of the people who sold the concoction we had made up with some small success in this locality was Mr. Charley King, who was then a reporter on the Pasadena Star News, I believe.

For reasons which I don't remember and which didn't interest me—I wasn't consulted especially—he brought Mr. Hanisch into the picture. I imagine that Mr. Hanisch, naturally, knowing my associa-

(Testimony of Dr. Henry Borsook.)

tion with it, as a sort of warrant, shall we say, for the quality of the product, asked to meet with me and such a meeting must have been arranged, because we met.

Q. All right.

A. And naturally Mr. Hanisch—I will have to reconstruct in the singular—I don't remember——

Q. All right, Doctor.

A. ——asked about the product, naturally, which I told him as much as I felt I was at liberty to. I think he asked me what my financial interest *as* in it, and I told him it was none. There was just that kind of exploratory conversation of a personal character.

We met a number of times after that. I think they [528] were always quite friendly occasions. Does that answer your question?

Q. Dr. Borsook, did Mr. Hanisch tell you that he was contemplating entering into a contractual relationship with The Vita-Food Corporation for the sale and distribution of this concentrate?

A. I don't know whether he told me directly, but it was obvious from the whole conversation. That was clear. I mean that was the purpose of our getting together. I was in on subsequent meetings where details were discussed and so on.

Q. Well now, do you recall those details, and in what connection they were discussed?

A. You will have to ask more specific questions, because I am afraid I would ramble all over.

Q. Dr. Borsook, did Mr. Hanisch seek certain

(Testimony of Dr. Henry Borsook.)

guarantees by you with respect to this concentrate, in the event you should enter into a contract with Vita-Food Corporation?

A. No, that is not my memory, because I wouldn't have given him one. He had to take my word, I was behind it. And I would see to the best of my ability it was a good product, and I told him that at the very beginning. That is the only kind of guarantee I could or would give.

Q. I believe you are still of the opinion that is a good product, was then a good product and is now a good [529] product.

A. Yes, it is excellent.

Q. Dr. Borsook, did Mr. Hanisch ask you for any assurances as to the financial ability of Mr. Lewis to manufacture this?

A. I don't think Mr. Hanisch——

Mr. Mackay: I object to that, if your Honor please; it is a leading question.

Mr. Maiden: If the Court please, Dr. Borsook is not very clear on this matter. I haven't discussed it with him.

The Court: Read the question, please.

(The record was read.)

Mr. Maiden: If the Court please, the testimony of Mr. Hanisch was that he received certain representations from Dr. Borsook with respect to the financial ability and general reputation, so to speak, of Mr. Lewis. Your Honor will recall that testimony. I am simply wanting to find out what repre-

(Testimony of Dr. Henry Borsook.)

sentations Dr. Borsook made in that connection, if any.

Mr. Mackay: I will withdraw the objection. I am sorry I made it.

The Witness: My recollection is that Mr. Charley King was the intermediary with that question. And I remember telling Mr. King that of course I knew nothing about Mr. [530] Lewis' financial circumstances, but that I had known him for a good many years. He had always made good on his commitments and on his promises, large and small, with me. They were small promises. They were always kept. I knew of his connection with other people. If Mr. Lewis gave his word he would see this thing through, that was good enough for me, and I thought it should be good enough for Mr. Hanisch.

Q. (By Mr. Maiden): Do you still have the same opinion of Mr. Lewis? A. Yes.

Q. Now, Dr. Borsook, something has been said in this lawsuit about controls or control numbers. I don't know what it is. Could you explain that?

A. Yes. With every batch of material which is made and put in the bottles there is a certain number of samples taken out that day and they are given a number. One is analyzed as quickly as possible, and others are set aside under different conditions, and then analyzed from time to time, in order to learn about the keeping qualities of the product. That is a routine procedure, and that was done from the very beginning.

(Testimony of Dr. Henry Borsook.)

Mr. Maiden: Take the witness, Mr. Counsellor.

Cross-Examination

By Mr. Mackay:

Q. Dr. Borsook, did you introduce Mr. Hanisch to Mr. Lewis?

A. I did not. To the best of my knowledge I think Mr. King was the intermediary there.

Q. What was the educational qualifications, so far as you know, of Mr. Lewis?

A. I don't know, except knowing him up to that time for about seven years, I should say he is one of the most intelligent, most educated people I had met. I don't know what schooling he had had.

Q. You have no idea of his background?

A. No.

Q. What kind of business was he in when you first knew him? A. I don't know.

Q. You didn't know what business he was in?

A. No. I don't inquire into the businesses of my friends. If they don't tell me I don't ask them. Do you?

Q. I want to make sure they are not a bootlegger.

Mr. Maiden: Mr. Mackay, are you inferring in this case somebody is a bootlegger?

Mr. Mackay: I withdraw it. I am sorry, Mr. Counsel. [532]

Q. (By Mr. Mackay): I meant, really, Dr. Borsook, you wouldn't recommend that a man was reliable and financially responsible to carry unless

(Testimony of Dr. Henry Borsook.)

you had a pretty good idea of his business capacity and business experience, would you?

A. Well, Mr. Mackay, I had some experience with that.

Q. That is what I am asking, what the background was of Mr. Lewis.

A. I have known Mr. Lewis for a good many years.

Q. What business was he in?

A. I don't know what business he was in then. I do know, in the course of the development of this particular product, over a period of nearly a year, Mr. Lewis—a good deal of money was necessary, many thousands of dollars, and a good deal of business arrangement and negotiations were necessary, all of which was carried out by Mr. Lewis. We didn't put up any money.

Q. Did that demonstrate your idea of business confidence in him?

A. That, plus my seven years' knowledge of Mr. Lewis and knowledge of a number of his friends with whom he had considerable dealings, who had never a dissenting voice as to his business ability and personal and financial integrity.

The Court: Do you know whether or not Mr. Lewis had any technical background? [533]

The Witness: I don't know, but he had it after he was through with me.

Mr. Mackay: I imagine he would. I am afraid I will know something, too; I hope.

Q. (By Mr. Mackay): Now, your principal in-

(Testimony of Dr. Henry Borsook.)

terest I understand you to say was to really raise the standard of nutrition of the American people, of the community, wasn't it?

A. My sole interest.

Q. That is your sole interest. That is what we may call a humanitarian interest.

A. Yes, you might.

Q. Your sole interest was to see that vitamins, this vitamin product could be sold very cheaply so that the great masses would be able to get the value of vitamins.

A. Yes. I have another reason. I was quite sure that once such a product came out and demonstrated that it would sell, it would be imitated very quickly all over the country, so the educational problem would be done.

Q. So that any product could be very easily instated.

A. I wouldn't say "very easily." With the technical knowledge the large pharmaceutical houses have, they could get out something like that.

Q. Your prime purpose was to see this product was sold very cheaply, so that the masses could improve their [534] nutrition standards?

A. Yes.

Q. Did you make that representation to Mr. Hanisch at that time?

A. Oh, of course, he knew that.

Q. He knew that at that time?

A. Of course. When he asked me if I was going to get out of it, and I told him, knowing it was obvious what my interest was.

(Testimony of Dr. Henry Borsook.)

Q. You were therefore concerned and very much interested in seeing that your purposes were accomplished? A. Yes.

Q. In getting cheap vitamins to the public?

A. Yes.

Q. Did you give any consideration at all to the—withdraw that. Were you consulted with respect to the agreement between The Vita-Food Corporation on May 5, 1941, and——

A. It was told there was an agreement, and I was assured that neither my name nor Cal Tech would be used in advertising. But otherwise I was not consulted.

Q. Weren't you concerned with the price?

A. Yes. And I disagreed with Mr. Hanisch and his advisers on the price they felt they had to charge. There were a good many discussions about that. [535]

Q. When did those discussions take place?

A. They went on from time to time. I can't remember the exact dates.

Q. It was after the agreement?

A. I can't remember that. I don't know.

Q. Did you think their prices were too high?

A. I don't wish to imply that I thought they were asking for an undue profit. I was disappointed they felt compelled to charge as much as they did.

Q. Did you know that Mr. Hanisch from May 5, 1941, to October 28, 1942, had not taken any salary from his corporation?

(Testimony of Dr. Henry Borsook.)

A. I was not—I didn't know the financial situation of either the——

Q. Did you know that that corporation sustained losses during that period? A. No.

Q. Then why did you think his prices were too high?

A. Because I knew what the ingredients cost and I knew what their final price was, and I had had dealings with business people before. I have come to distrust statements that they are always losing money.

Q. Now, Doctor, of course the record here does show very definitely, I may state, the facts I have already stated with respect to no salary received by Mr. Hanisch [536] and no profits made by this company during that period.

A. May I interrupt there, Mr. Mackay?

Q. Yes.

A. I think Mr. Hanisch will tell you I was in a meeting with him and his advertising consultant and that I told him I didn't care to be a party to keeping advertising people going in the standard of living to which they were accustomed.

Q. Well now, of course, you knew what the products could be purchased for, and you knew the cost of them, didn't you? A. Yes.

Q. Did you concern yourself at all with the price, the cost to The Stuart Company of these products?

A. I remember that discussion, Mr. Mackay, very well. I told Mr. Hanisch and his business adviser with him—the name I have forgotten now—I

(Testimony of Dr. Henry Borsook.)

felt that we technicians, the group of people with me, we had done our job and we had done a pretty good job and it was up to the business people to do as good a job. I didn't feel they had.

Q. Did you represent to Mr. Hanisch that he could buy this product at a price from Vita-Food for less than other products could be—similar products could be purchased on the market?

A. I did not discuss with Mr. Hanisch any of the [537] financial arrangements between him and The Vita-Food Corporation. That was none of my business.

Q. (By The Court): Dr. Borsook, what about this: How much does molasses cost? How is it sold?

A. It is sold by the barrel.

Q. How much does it cost a barrel?

A. I don't know what it costs a barrel now.

Q. How much did it cost a barrel in 1941?

A. I am sorry, I don't remember.

Q. You said you knew the cost.

A. At that time.

Q. Approximately what does molasses cost a barrel? A. A barrel?

Q. Yes.

A. I would have to make a guess, your Honor. I would say somewhere in the neighborhood of $10.00 a barrel.

Q. How many gallons are in a barrel?

A. I would have to guess again. Somewhere between 50 and 100.

Q. Between 50 and 100 gallons?

(Testimony of Dr. Henry Borsook.)

A. More nearly 100, I would guess.

Q. 100 gallons to a barrel? A. Yes.

Q. Four quarts to a gallon? [538]

A. Yes.

Q. Eight pints make a gallon? A. Yes.

Q. Now, in our economic system we have middlemen and—— A. Yes.

Q. And the middleman has to charge more than he pays. A. Yes.

Q. He has distributing costs, he requires a certain profit for his work. A. Yes.

Q. And he has to resell for more than he pays when he purchases the products. My question is this: It would be very important in carrying out your purposes to have a vitamin compound available to the public at a small price, low price, that the manufacturer did not charge too high a price to the distributor, isn't that true? A. Yes.

Q. That would be important? A. Yes.

Q. Now, did you say you never inquired how much Vita-Food Corporation was charging The Stuart Company for the stuff? I use that word stuff because it is short.

A. I didn't mean to imply——

Q. I wanted to have you answer the question yes or no. I say, did you testify you never inquired how much Vita-Food [539] Corporation was charging The Stuart Company for the stuff?

A. Your Honor, that was not my understanding of the question asked me at the time.

Q. Now then, I will ask you the question: Did

(Testimony of Dr. Henry Borsook.)

you know how much Vita-Food Company was charging The Stuart Company for the stuff?

A. Yes.

Q. You did? A. Yes.

Q. Did you think it was high, low or medium?

A. I thought it was medium.

Q. Were you disappointed at the price they were charging The Stuart Company?

A. I thought what they were charging The Stuart Company was a medium price.

Q. Were you disappointed at the price they were charging? A. Yes, a little.

Q. You were disappointed with them, too?

A. Yes, I thought the final retail price was much greater than I had expected it would be.

Q. (By Mr. Mackay): Were you ever consulted subsequent to that time with respect to raising the retail price? A. There were discussions. [540]

Q. Did you ever allow it or approve the raising of the price to Mr. Hanisch?

A. I had no opportunity to allow or not allow.

Q. Were you consulted about it?

A. Yes. And I expressed my opinion; I had no veto power.

Q. Didn't Mr. Lauerhass come to you for permission to raise?

A. Not for permission; I didn't have permission to give.

Mr. Mackay: May I call for the letter of January 20, 1941?

The Court: What letter is that?

(Testimony of Dr. Henry Borsook.)

The Witness: That is the one——

The Court: Would you like a short recess?

Mr. Maiden: Yes. Or take our lunch recess.

The Witness: I would like to go on, your Honor.

The Court: I was thinking we ought to keep on with Dr. Borsook, so he won't have to come back.

(Short recess taken.)

The Court: Proceed, Mr. Mackay.

Q. (By Mr. Mackay): I call your attention to Exhibit L. I think you have it in your hand, don't you? A. Yes. [541]

Q. Which is the letter to Charley King from Mr. M. H. Lewis, Treasurer of The Vita-Food Corporation. A. Yes.

Q. And particularly to the fourth paragraph which says, "We are in a very solvent position today, and intend to remain so. Our entire accounts payable are less than $100.00. We buy for cash and sell for cash. Your experience with us, and the fact that Dr. Borsook has gone into our situation thoroughly, and has entrusted us with great responsibility—both financial and ethical—should indicate the extent of our responsibilities."

Is that statement true, in your opinion?

A. The statement is true—now, which statement do you refer to?

Q. The one I read.

A. There are a number of statements in that paragraph.

Q. The one I read. "Your experience with us, and the fact that Dr. Borsook has gone into our

(Testimony of Dr. Henry Borsook.)

situation thoroughly, and has entrusted us with great responsibility—both financial and ethical—should indicate the extent of our responsibilities."

A. Yes.

Q. You had entrusted both?

A. Especially the ethical.

Q. And financial? [542]

A. That was his risk.

Q. You were interested in getting the vitamins?

A. Yes, to get them as cheaply as possible.

Q. Therefore you were interested very materially with the cost of production? A. Yes.

Q. Did you concern yourself at all with the prices which The Vita-Food Corporation was obligated to pay under this contract of May 5, 1941?

A. With the Vita-Food Corporation——

Q. I mean the Vita-Food Corporation sell to The Stuart Company under the agreement of May 5, 1941. A. I was told what the price was.

Q. Had you gotten the contract?

A. No, not to my knowledge.

Q. He had told you the prices?

A. I was told what they were, yes.

Q. Had you checked those prices?

A. Only to the extent of asking Mr. Lewis to give me his breakdown by which he arrived at that price. And I must confess, as I told the Court, I was disappointed it cost that much to do business.

Q. You stated a while ago that you told Mr. Hanisch that this product could be produced and

(Testimony of Dr. Henry Borsook.)

sold much cheaper than any other product, didn't you? [543]

A. That was true, but was still too dear by my notions, of what I had hoped it would be. It was still then the cheapest and best product on the market.

Q. Did you ever ask Mr. Lewis to reduce the cost of the product?

A. I could not ask him to do that. We discussed it many times, to see how it might be done.

Q. He was a good friend of yours, wasn't he?

A. Yes, but I couldn't ask a man to deliberately lose money.

Q. Do you know whether he was losing money?

A. I don't know.

Q. Do you know whether he was making money?

A. I don't know.

Q. You didn't go into the question to determine whether the company was making money?

A. No. I was not a stockholder and I was in no way——

Q. Had you visited Mr. Lewis at his home several times? A. Many times.

Q. Where did he live prior to 1941, do you remember?

A. He lived in two places at different times. He lived once—I *should* take you there, I don't remember the street. It was in South Pasadena.

Q. It was a rather moderate home? [544]

A. One of them was. The other one is an elaborate home.

(Testimony of Dr. Henry Borsook.)

Q. Where is the elaborate home?

A. It was the top of a hill off Monterey Avenue.

Q. It was in Altadena?

A. No, Monterey Avenue. That as also in South Pasadena.

Q. Now, if you had known this product could have been purchased for at least 30 cents less per unit, would, in your opinion, your purpose have been better served if somebody else had manufactured it?

A. Yes, manufactured as good a product for 30 cents less, they certainly would have been better served.

Q. Didn't you know that the product could be manufactured much less than that?

A. It was not being done. They were much dearer.

Q. Vitamins weren't very expensive?

A. They were expensive then, compared to now. It was after that time that vitamins decreased very rapidly.

Q. When did they decrease?

A. In the years after 1941, during the middle and later war years.

Q. 1945 and 1946? A. About 1944, 1943.

Q. Prices kept up about the same from 1941 to 1945? [545]

A. No, they went down through all of 1941. Let me give you an example of what my recollection was. Vitamin B1 was down to approximately 20

(Testimony of Dr. Henry Borsook.)

cents. Vitamin B1 was about $1.50 a gram. Ribonflavin was much dearer than that.

By the end of the war Vitamin B1 was down to approximately 20 cents a gram and ribonflavin was about 40 cents a gram. There were steps by reduction. The greater changes occurred, not during 1941, as to my recollection of those figures.

Q. Did you concern yourself as to whether or not the prices reduced to The Stuart Company because of the decreases in price?

A. When I was consulted, associated as a consultant, there were no considerable reductions in the price of vitamins, and there was no reduction in the price of Stuart formula.

Q. Was this product a natural product, as the Galen B rice product?

A. Yes, but it is a question that has no meaning scientifically.

Q. Was it a natural product?

A. Yes, in part.

Q. And part scientific? A. Yes.

Q. Did you approve the label? [546]

A. Yes.

Q. I call your attention to Exhibit 9, which is the label and which you approved, and that states, "An aqueous concentrate derived from natural food sources, fortified."

A. Yes. Yes, I approved that.

Q. Now, do you mean to tell the Court that this was a perfected and satisfactory product when you

(Testimony of Dr. Henry Borsook.)

knew that molasses formed gas and might cause illness?

A. I knew it would form gas. It didn't happen very often. It certainly would not cause illness.

Q. Could it cause indigestion and distress?

A. No. The gas formation is something that occurs very slowly in the bottle and accumulates over a month or two months.

Q. Suppose the product were out a year.

A. The only harm that would be done would be to mess up a druggist's shelves. It couldn't hurt anybody, couldn't possibly hurt anybody.

Q. But you did, I think I understood you to say, on direct examination, represent that was a stable product and a perfected product at that time.

A. I did not use the word "perfected" to my recollection. It was a usable product.

Q. Commercial product? [547]

A. Yes, it was a commercial product.

Mr. Mackay: I think that is all.

Redirect Examination

By Mr. Maiden:

Q. Dr. Borsook, just a moment. Mr. Mackay called your attention to the statement, "An aqueous concentrate derived from natural food sources, fortified." A. Yes.

Q. And he asked you if you approved that label.

A. Yes.

Q. And you said you did? A. Yes.

(Testimony of Dr. Henry Borsook.)

Q. Was there anything wrong with your approving that?

A. No, it was perfectly proper.

Q. Does that represent any misrepresentation at all? A. None whatever.

Mr. Maiden: That is all.

Mr. Mackay: That is all.

Q. (By The Court): I wanted to ask you one more question. You knew what the formula was in 1941 and 1942? A. Yes.

Q. The formula being used by Vita-Food Corporation? A. Yes.

Q. You say that if you add water to molasses that [548] fermentation may happen, if you add enough water. A. Yes.

Q. In the formula that was being used, how concentrated was the molasses?

A. Straight molasses in which no fermentation could occur.

Q. It was straight molasses? A. Yes.

Q. Is straight molasses very sweet?

A. Yes.

Q. Now, it has been testified here that there was some complaint about the flavor of the product. People found it very sweet. That testimony would be true, then, wouldn't it, if they used straight molasses?

A. Your Honor, there are complaints of the flavor of every conceivable food product.

Q. I am not asking you to discuss it. I am asking you whether that would be a true complaint if

(Testimony of Dr. Henry Borsook.)

someone said, "Well, it was very sweet." That was true, it was sweet, wasn't it?

A. I should say that was a personal complaint, not a true complaint. There is a distinction.

Q. Molasses as sweet?

A. Yes, but people vary, whether they like it or not.

Q. People have a different tolerance for sweetness, [549] that is what you mean to say?

A. Yes, I would say most users did not object.

The Court: Are there any other questions?

Mr. Mackay: There is one more question I would like to ask.

Recross-Examination

By Mr. Mackay:

Q. Dr. Borsook, I understood on direct examination that you stated you were anxious to get this on the market at a low price so that when it was on the market others could imitate it rather quickly and make a wide distribution, so it would increase the nutritional value. A. I hope I——

Q. I mean increase the nutrition standard.

A. I said I expected that the large distributors, when they saw this product was selling and at a price which was much lower than theirs, they would no doubt, out of sheer reasons of competition, seek to get a similar product. And I was quite sure the large pharmaceutical houses had technical people who could do it.

Q. They could have taken the label there and easily duplicated it?

(Testimony of Dr. Henry Borsook.)

A. No, it wasn't that easy. For instance, for some years after this product was gotten out there was not another product on the market, to my knowledge, in which [550] the Vitamin A or the Vitamin B1 was as stable. That was a secret technical process.

Q. Were you familiar with the controversy that the Vita-Food got into with the Rite Laboratories?

A. I don't remember. Certainly, I had nothing to do with it especially.

Q. You knew they were putting out a very similar product?

A. I doubt it. It may have been mentioned to me once, possibly in a casual conversation, but that wasn't the sort of thing——

Q. Was it a molasses base?

A. I don't know. I certainly didn't see it. I wasn't consulted in any steps that were taken.

Mr. Mackay: That is all.

Mr. Maiden: That is all.

The Court: Now, the witness may be excused?

Mr. Mackay: Yes.

The Court: You need not return this afternoon.

(Witness excused.)

The Court: We will recess until 10 after 2:00. Do you think that will be enough time?

Mr. Mackay: That will be all right with us.

The Court: All right.

(Whereupon, at 12:50 p.m., a recess was taken until 2:00 p.m. of the same day.) [551]

Afternoon Session—2:20 P.M.

Mr. Maiden: May it please the Court, at the noon recess my attention was called to the fact I had failed to ask Mr. Wiseman——

The Court: Do you want him to take the stand again?

Mr. Maiden: Yes.

The Court: Will you take the stand, Mr. Wiseman?

Whereupon,

OSCAR WISEMAN

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Maiden:

Q. Will you state to the Court the conversation that took place between you and Mr. Dunlap and Mr. Hanisch on the nights of November 27th and 28th at the time of the execution of that final agreement, in detail?

A. Well, I first talked with Mr. Dunlap at the hotel from about 6:00 to 8:30. Shall I relate first——

Q. Please do.

A. Mr. Dunlap had called me and told me he

(Testimony of Oscar Wiseman.)

wanted to clear up some pending orders and give me the payments required, and so on. I said, "All right." [552]

And he came up to the hotel. We straightened that out rather quickly. Then he told me that he had talked further to Mr. Hanisch and he had seen the complaint and the restraining order I had filed and caused to be served on a lot of people, as he put it. And after talking it over with Mr. Hanisch they were prepared to make a better offer.

I said, "Well, I would be glad to hear about any better offer." And we proceeded to discuss quite a few things.

Mr. Dunlap had a copy of the complaint and the restraining order in the injunction suit in his pocket, and he brought it out.

He asked me who Mr. Fulwider was. I told him he was a man that specialized in trade-mark and patent cases. He was associated with me. It was important to me, I wanted Mr. Fulwider to check my work, so what I did would be done with care. That his work was incidental.

He told me that it was a damn good complaint. I thanked him for that. And he asked me why I served so many people. I told him that I considered it good practice to serve the principal officers of a corporation in a trade-mark infringement case.

He wanted to know what I intended by the injunction suit. I told him simply we wanted to enjoin them from [553] doing the things that he had threatened they might do, such as use the name in

(Testimony of Oscar Wiseman.)

disregard of our trademark registration and our title.

And he asked me what I thought of their acceptance of our cancellation, and his rescision which he had served upon us.

I told him that I thought the answer to that was contained in the way I had set up in the complaint, that we had accepted their view that it would be a total cancellation in that I had pleaded, I believe, both their acknowledgment of our notice of cancellation and their notice of rescision. So far as we were concerned, the matter was ended.

Q. What did you mean about the "matter was ended"?

A. Well, that the contract was terminated for all purposes, as far as I viewed it. And in the course of that conversation he told me that he could offer $150,000.00 upon certain terms and conditions.

I told him that that wasn't sufficient. And he started to recite some things about fraud and other things that we discussed in some of our earlier meetings. I told him that I was not interested in discussing any of those things, that he had made threats in those regards at earlier meetings. We answered that by filing our lawsuit, standing upon our ownership and asking the court to protect [554] it. That if he wanted to discuss those matters, those matters we could discuss before a Court. That if he wanted to buy the trade-mark we would discuss that. We would not discuss these other matters.

(Testimony of Oscar Wiseman.)

Anyway, I finally told him that he could possibly do better than the $150,000.00 and if he would like, to get Mr. Hanisch on the phone and get his views on it and then maybe we could discuss the matter further. I told him he could get in touch with me in a day or so. He said, "Well, I might be able to get hold of him this evening." That this case had been pressing upon him and he would like to get it over with. And would I stand by. I said all right.

He called Mr. Hanisch and he came back and told me that he thought that they could come a lot closer to our figure and that if I would go with him to his office we could discuss it a little further, and Mr. Hanisch would be able to join us and Mr. Hanisch could tell me directly how much he would pay.

We did. We went to Mr. Dunlap's office then in the First Trust and Savings Bank Building, I believe, in Pasadena. We discussed it a little—quite a bit further. I think Mr. Hanisch came in in about an hour or so after we were there.

Q. When you said that he told you what he thought he could pay, pay for what? [555]

A. For the trade-mark.

Q. Go ahead.

A. Before Mr. Hanisch arrived he wanted to know what we really wanted, what was our lowest figure. I told him it was $250,000.00. I was prepared to accept that amount and I didn't like the idea of any payments. From what I understood about the financial picture of the company and Mr.

(Testimony of Oscar Wiseman.)

Hanisch there was no reason in my mind why it shouldn't be a cash deal.

He told me that he thought he could come up quite a bit. He wanted me to wait until Mr. Hanisch got there, but I didn't think he would go that high.

Then he outlined that Mr. Hanisch did not want to pay the money out directly, that he already had advanced some $50,000.00 to the company, and it was a rather difficult matter from a tax standpoint to get it back. He wouldn't want to lay out another much larger substantial sum and then have that same problem again.

We had discussed the payment of a fixed amount on the amount that we sold. Mr. Dunlap wanted—he said, "We will pay you the quarter of a million dollars on a straight royalty basis, that is, on a percentage of our profits."

I told him we weren't interested in any deal other than a fixed sum deal or one that could be computed [556] into a fixed and definite amount. We wanted to sell for a definite price and we were not interested in any royalty agreement.

Q. Sell what, Mr. Wiseman?

A. The trade-mark. He said, "Well, we might be able to work it out with some cash down and the balance paid on a 7½ cent rate, with adequate guarantees to you it would be fully paid or you would get it back."

Q. Get what back, the trade-mark?

A. The trade-mark. Then he brought up the tax question. He said that if he was assured that they

(Testimony of Oscar Wiseman.)

could handle it as an expense of the business, why, he thought Mr. Hanisch would be willing to pay a good deal more for it.

I told him that the figure we had stated, or that I had stated was on the basis of an outright sale. We had in mind also the tax questions and we felt we would make a capital sale or not at all.

Q. Mr. Hanisch finally arrived?

A. Mr. Hanisch finally arrived and I think he started off the conversation by saying, "Why in the hell did you serve us on Thanksgiving?"

And I answered by saying, "Why in the hell did you give us 48-hour ultimatums?"

There were pleasantries for quite a little while. Mr. Hanisch thought I was a fine fellow and apparently knew [557] what I was doing, and it was a pleasure to deal with me instead of that blank, blank Lewis.

He asked me what I wanted. I told him he wanted a quarter of a million dollars, wanted a check for it.

And he told me that he wanted any payments made through the company and not through himself, that he wanted to get it back some day and that that was the best way for him to get it back.

He said, "Unless it would be a royalty basis we can't pay you that much."

After considerable discussion they asked me whether or not I would take $200,000.00. I told them I thought he stopped at $250,000.00, that I would have to think it over and I would like to pos-

(Testimony of Oscar Wiseman.)

sibly call somebody connected with my client; other than myself, to get their views on it.

At about 3:00 o'clock in the morning I went out of the building and across the street, I think, in a parking lot or some place, and found a telephone. I called Mr. Lewis on the telephone and told him we had what appeared to be a definite offer of $200,000.00.

Q. Definite offer as to what?

Mr. Mackay: I object to that as pure hearsay.

Mr. Maiden: I think Mr. Wiseman has a perfect right to tell the Court what he told Mr. Lewis on the [558] telephone. Mr. Lewis is here and is going to be a witness in the case.

Mr. Mackay: Conversation certainly between Mr. Wiseman——

Mr. Maiden: If your Honor please, this is a part of the res gestae and the hearsay rule wouldn't apply.

Mr. Mackay: If your Honor please, the conversation, if the witness were permitted and we made no objection, subject of the conversation at the meetings at which Mr. Hanisch and Mr. Wiseman were, when they were negotiating, but certainly a conversation with this witness and Mr. Lewis at this time is entirely incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Maiden): Now, Mr. Wiseman, just skip that point. If there is anything else now that was said between you and Mr. Dunlap and Mr.

(Testimony of Oscar Wiseman.)

Hanisch before the execution of this contract that you haven't told us about, please do so.

A. After I used the telephone, I went back and told Mr. Hanisch we were—we would take $200,000.00, provided we could have positive assurance from him it would be fully paid; and whereupon Mr. Dunlap said, "Well," he said, "let's see if we can't reduce it to typing." [559]

Mr. Dunlap put some paper in the typewriter and went right to work. He apparently had a bad carbon in the typewriter or something, and after doing a couple of pages—I told him I didn't like the language used and besides it was a very——

Q. You are referring to Respondent's Exhibit U?

A. Yes. He agreed and said, "Well, sure, that looks pretty bad." He said, "I will try it again and you tell me what you don't like and I will try to get them out of the draft."

I did, and he went to work on the second draft which is apparently Exhibit T.

Q. Respondent's Exhibit T?

A. Respondent's Exhibit T. After he got through with that we discussed that quite thoroughly and I objected to it in a number of particulars. I particularly objected to his mentioning the word "royalty" in the first draft, and the way he had treated the delayed payments.

Q. Mr. Wiseman, at that point, is there any difference between the use of the word "royalty" in that first paragraph, or, rather, that first draft, and

(Testimony of Oscar Wiseman.)

the use of the word "royalty" in the final draft you signed? A. Yes.

Q. Will you explain what it is?

A. There is a decided difference in [560] Paragraph 4. The first draft, it is referred to as "royalties." I didn't like that terminology. In the second draft it was referred to as "royalty" and additional consideration. I didn't like that, either. In the final draft, as it reads now, it is to be paid on a royalty basis and any additional amount, and so forth. We discussed the matter of the terminology of quitclaim transfer which, I believe, I have already testified thoroughly about.

There was one other thing I recall that was discussed in the early part of the meeting, after Mr. Hanisch had been there a very short time. He advised me again he had lost $60,000.00 in the company and that really all he wanted was a chance to get even.

I told him on that he had about $45,000.00 or $50,000.00 worth of stock on hand, that he had some office equipment; that is credit. And he had stationery and so on, and that I thought if he wanted it I could get a check for the $60,000.00 if he would turn the company over to us.

Q. Turn what company over?

A. The Stuart Company. He wasn't interested in that. We got back to the point where he wanted to buy us out. He started to mention at one time that he would like to buy the plant. I told him that

(Testimony of Oscar Wiseman.)

was not for sale. That the only thing we would have for sale, if at all, would be the prestige. [561]

In the earlier part of the conversation, in the pleasantries, he told me he had been pleased with the way I handled the Rite case and the way I served the Food and Drug question as to the new plant. And also the manner in which I had handled spoilage of bottles that occurred in the summer of '42.

He said he liked doing business with me and if he had been doing business with me right along the companies would probably not have had a falling out.

I told him that was unfortunate, I knew he and Mr. Lewis were very positive gentlemen, that they had had very considerable differences, and I told him that I had prepared five or six or seven drafts of a modification which I hadn't discussed with him or his lawyers, but I knew he had gone over it.

"Apparently efforts between you and Lewis to settle differences between these companies never got any place."

I said, "It is my desire to keep personalities out of this and to settle it on a sensible basis, if at all."

He also asked me during the conversation, in the early part of it, what the termination was.

We said we acquiesced in a final cancellation, we, in effect, stated in our complaint.

He said, "I couldn't rely on that." He said, [562] "That guy Lewis is liable to pull anything. You

(Testimony of Oscar Wiseman.)

might tell me that. I wouldn't be satisfied to leave it stand that way."

I told him that all he wanted was a release, freedom, it was all right providing they disclaim what I consider to be fictitious claims.

Q. Did you offer him such a release?

A. I offered that several times. I offered it in the Sunday meeting with Mr. Dunlap and Mr. Hanisch. I told Mr. Dunlap that in one of our earlier meetings, which I mentioned again during the final meeting.

Q. That was a release from the contract of May 5, 1941? A. That is right.

Q. On cross-examination Mr. Mackay showed you an exhibit in which we have these labels set out. I don't know what exhibit that is.

Mr. Maiden: What is that, Mr. Mackay?

Mr. Mackay: Mr. Dunlap 9.

Q. (By Mr. Maiden): He asked you in connection with the application that you had made for federal registration for this trade-mark for "the Stuart formula" whether or not the registration would have been granted if you had presented the entire label. You stated in your opinion it would not [563] have been.

Now, I would like to have you explain just what you meant by that answer.

Mr. Mackay: Pardon me. May I have the question?

(The question was read.)

The Witness: I don't think——

(Testimony of Oscar Wiseman.)

Mr. Mackay: I don't think he stated in his opinion it would have been.

The Witness: I stated it would not have been.

Q. (By Mr. Maiden): Would you explain that, Mr. Wiseman?

A. Yes. The label contains a lot of general information that says Vitamin Complex B on it, B1 and so on.

It has recitation about one tablespoon and three teaspoons and so on on it. It has a lot of recitations which are not the subject of appropriation by trademark. The only thing we had the right to was the trade-mark "the Stuart formula."

We could possibly, and it had been discussed we could have copyrighted the label as a whole, but we had no right to appropriate things like Vitamin A, D and so on. We did, of course, have the right if anybody, such as the Rite Laboratories, who simulated our whole label, to assert our common law rights on unfair competition and unfair use. [564]

Q. Mr. Wiseman, was it any concern of yours at the time of the execution of this contract in November, 1942, this agreement, how The Stuart Company might treat this transaction on their records?

Mr. Mackay: I object to that, if your Honor please; entirely irrelevant, immaterial, incompetent. What concern it was of his has nothing to do with it.

The Court: The objection is sustained.

Q. (By Mr. Maiden): Was there anything said at the conference in that connection by you to Mr. Dunlap or Mr. Hanisch?

(Testimony of Oscar Wiseman.)

A. I discussed with Mr. Dunlap these tax questions rather extensively. I don't believe I related that part of the conversation. One thing that came up was I objected to the title that he put on the agreement and we had agreed to leave any title off and just have it blank as far as any designation is concerned. But when we got through with it it was on there, and I did not insist it be taken off. It was 6:00 o'clock in the morning when we finally left it on. I objected to it on the ground it was a misnomer for the agreement. But as it was merely a top designation I didn't see where it could do any particular harm.

In discussing the tax questions Mr. Dunlap at one point pulled some books off the shelf of—I [565] don't know whether it was Prentiss Hall or somebody, and tried to point out to me it would be an expenditure on their part, regardless, and I told him from the four corners of the instrument we were retaining title or would retain title upon certain contingencies. We were getting a specific price for a specific thing, a trade-mark. And I didn't see—no matter how you named it or what you did with it, it would still be the sale of a capital asset.

He wanted to use entirely different language. The royalty language he tried to use on royalty was only one example.

He tried to use quite different terminology and methods—in methods of payment, so that it would definitely be his opinion an expenditure or expense matters, so far as his clients were concerned.

I intended to, and I believe did, restrict the con-

(Testimony of Oscar Wiseman.)

tract to a simple sale upon conditions. I did tell him at that time——

The Court: Where did you restrict it to that in the contract?

The Witness: Pardon me?

The Court: Where did you do all that in that contract?

The Witness: By transferring them.

Mr. Mackay: Exhibit 12. [566]

The Court: If you had you might not have a case here.

Mr. Maiden: The language used is a compromise, your Honor.

The Court: Well, we offered the contract this morning—go ahead, Mr. Maiden.

Mr. Maiden: I believe that is all, if the Court please. You may take the witness.

Cross-Examination

By Mr. Mackay:

Q. Mr. Wiseman, isn't it a fact when you began drafting this agreement you assisted Mr. Dunlap in drafting it?

A. No, I don't think so. I talked to him about it and he was at the typewriter—we talked as he went along somewhat.

Q. Isn't it a fact you sat there, you were there with him and you dictated to him while he was typing?

(Testimony of Oscar Wiseman.)

A. Yes, I interposed suggestions as he went along.

Q. You would say, in all fairness, both of you dictated the contract?

A. I wouldn't say that.

Q. You assisted in dictating the contract?

A. I made suggestions.

Q. You assisted in dictating part of it, didn't you?

Mr. Maiden: You don't have to agree with [567] it if it isn't so, Mr. Wiseman.

The Witness: All I can tell you is the facts. Mr. Dunlap was sitting at the typewriter typing. As we went along I would make a suggestion or two and he would ignore me or follow me as he felt like at the time, or argue with me. I certainly participated in the total language used.

Q. (By Mr. Mackay): You wouldn't deny you assisted him in dictating the terms of the contract, would you?

A. Well, I don't know what you mean. It wasn't Mr. Dunlap and I dictating to a secretary; it was Mr. Dunlap doing the physical job.

Q. He was at the typewriter and you were dictating? You understand what dictating is, don't you?

A. Yes, I understand what dictating is.

Q. You deny you assisted in dictating this contract?

A. Yes. I don't believe the contract was dictated. We discussed it and Mr. Dunlap typed it up.

(Testimony of Oscar Wiseman.)

You don't dictate to a lawyer, you dictate to a secretary.

Q. Wasn't he acting as secretary when he was there at the typewriter?

The Court: No, Mr. Wiseman, you dictate to who is taking it down. It doesn't matter whether he is a lawyer or anything else. [568]

Q. (By Mr. Mackay): Now, did you object to the first line in Paragraph 1 which says, "First Party hereby agrees to dismiss with prejudice the said action No. 482045"?

A. No, I had no objection.

Q. Did you object to the language that all parties—that "said agreement made May 5, 1941, is hereby cancelled and terminated"?

A. Are you talking about Exhibit 12?

Q. Yes.

A. All of that language I agreed to.

Q. You didn't object to that, but you did say you objected to the heading of the agreement.

A. Yes.

Q. Which says "Agreement of settlement of litigation and cancellation of contract." I will ask you to please refer to Exhibit 12. In all fairness, Mr. Wiseman, state whether or not in Paragraph 1 you didn't approve a contract and sign a contract which specifically dismissed an action and specifically terminated the agreement. I will ask you if that heading is quite descriptive of the terms of the contract, of the contents of the contract?

A. I would answer that yes, and partially no.

(Testimony of Oscar Wiseman.)

We did agree to dismiss with prejudice the pending action. We used the words of cancellation and termination, but we [569] only used those because the second part—we only used those because we wanted, or rather, Mr. Hanisch and Mr. Dunlap wanted in writing what I had said had already been effected. We had no objection to having the final language used in the writing so that going back over this transaction later it could not be argued any part of the contract was still in existence, but it had been my position at that time and still is the contract was at an end and at rest before this agreement was signed.

Q. Had they accepted that?

A. They said, "Yes, that is all right, as *far* you say it. But we don't—we wouldn't trust what Mr. blankety blank Lewis would do. Therefore, we want it in writing."

Q. Isn't it a fact, Mr. Wiseman, that Mr. Dunlap had then prepared a complaint charging fraud, and that you had a suit pending? Isn't that some of the things you were trying to settle?

A. I never saw any complaint or any pleading that Mr. Dunlap had.

Q. I am not asking if you saw it. You testified you knew he had.

A. I haven't testified. He threatened he would bring such an action. He never told me he had such an action ready.

Q. You said a moment ago in your direct examination [570] that Mr. Hanisch stated—that you

(Testimony of Oscar Wiseman.)

stated, "We ought to settle this on a sensible basis." What did you mean by settling it on a sensible basis? A. Well,——

Q. What were you trying to settle at that particular time? That is the question I am asking.

A. We were not—I was not trying to settle anything. I was there to sell a trade-mark. If incidental to that sale we settled and disposed of pending litigation or any other claims that one corporation might have against another, I was prepared to do so incident thereto.

Q. I know, but you stated a moment ago on direct examination, I think, that you were called over there and that you had many discussions and you didn't arrive at any understanding until about 3:00 o'clock.

Now, from the time you met Bob Dunlap and Mr. Hanisch, weren't you, in fact, discussing the complaint, the charges they had on them and they were discussing the charges and the countercharges and the cancellation of the contract? Is that a fact?

A. We had some discussions of that nature, yes.

Q. Just some?

A. In the early part of the meeting that I had with Mr. Dunlap at the hotel, when we first started, he started bringing those things up and I told him that I was not [571] interested in discussing those things, that I was not interested in any more ultimatums. We had answered those charges by filing an answer and his clients had been served with it and the place to discuss those was the court where

(Testimony of Oscar Wiseman.)

that action was pending. The only thing we were interested in discussing was the sale of the trade-mark.

Q. Isn't it a fact that you had Mr. Dunlap and Mr. Hanisch, on the one side, making certain contentions with respect to the contract of May 5, 1941, and that they were discussing their notice of rescision and that they were discussing the—your notice of rescision and your complaint?

A. I related the conversations I had with them as to those things. Would you like to have me restate it?

Q. No. I think it is not necessary. You want this Court to believe, do you, Mr. Wiseman, that the only thing that you did in the conversations here with Mr. Dunlap and Mr. Hanisch was to arrive at a purchase price for the sale of a trade-mark? Is that all you want this Court to believe?

The Witness: Would you read the question, please?

(The question was read.)

The Witness: No, it isn't.

Q. (By Mr. Mackay): What other discussions did you have then?

A. We have many discussions. The conversations lasted for hours upon hours, but the principal thing we [572] discussed was the sale of the trade-mark. We discussed personalities and taxes and a lot of things. The only thing of any consequence we discussed was the price and terms of sale of the

(Testimony of Oscar Wiseman.)

trade-mark. We felt we were entitled to a general release and they were entitled to it. [573]

Q. What time did you start typing?

A. I didn't start typing. Mr. Dunlap did the typing. I think he started around 3:00 o'clock in the morning.

Q. It took you from 3:00 to 6:00 o'clock for you and Mr. Dunlap working on this contract together to draft a contract? A. Yes.

Q. You intended that to mean what it said?

A. The final agreement?

Q. Yes. A. Yes.

Mr. Mackay: That is all.

Mr. Maiden: Just a second. I want to ask one question here.

Redirect Examination

By Mr. Maiden:

Q. Mr. Wiseman, I want to know whether or not you were asking Mr. Hanisch or Mr. Dunlap for any money for a release from the contract of May 15, 1941?

A. When we discussed that, or when it was brought up I did not ask nor was it our intention, if they wanted a general release, to ask for any money.

Q. Had that already been made clear?

A. Yes, that was quite clear. We said, "We will call it quits and make no claim against you at all. We have already [574] accepted your acknowledgment and the terms of your acknowledgment of our

(Testimony of Oscar Wiseman.)

cancellation and your rescision. The contract had ended and we will let it stand and we will give you a general release, providing you disclaim in writing to us any claims that you seem to have asserted recently to the trade-mark."

Mr. Maiden: That is all.

Mr. Mackay: May I ask one further question?

Recross-Examination

By Mr. Mackay:

Q. I call your attention, Mr. Wiseman, to the label which is on Exhibit 9, and I ask you if that doesn't say "The Stuart Company, Sole Distributor, Pasadena, California"? A. Yes, it does.

Q. You knew then that The Stuart Company had been the sole distributor of these products?

A. Yes.

Q. When you filed your application?

A. Yes; The Stuart Formula products.

Q. Why did you tell the United States Patent Office that you had sold those goods at Vita-Food Company under its name?

A. For two reasons, Mr. Mackay. Number 1, The Stuart Company was the agent of The Vita-Food Company, and the sales it made were in effect sales by The Vita-Food Corporation. [575] And I believe that that is correct under trade-mark law, that interpretation is accepted.

Secondly, in making that amendment, as I related this morning, I inquired and saw invoices and cor-

(Testimony of Oscar Wiseman.)

respondence relating to some pilot shipments of this product in interstate commerce, one of which I recall was a shipment by mail to Chicago.

Q. Just a pilot shipment. Let me ask you this: Do you mean to tell this Court in your opinion the agreement—under the agreement of May 5, 1941, The Stuart Company is the agent of The Vita-Food Corporation?

A. I would say they are a selling agent for The Vita-Food Company, exclusive selling agent for The Vita-Food Company, under that contract.

Mr. Mackay: That is all.

Mr. Maiden: That is all.

The Witness: May I be excused?

The Court: I want you to stay until Mr. Lewis is finished. You may step down.

(Witness excused.)

Mr. Maiden: Mr. Lewis, will you take the [576] stand?

Whereupon,

MAXWELL H. LEWIS

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please, Mr. Witness.

The Witness: Maxwell H. Lewis.

Direct Examination

By Mr. Maiden:

Q. Mr. Lewis, what is your connection with The Vita-Food Corporation?

A. I am managing director.

Q. What was your connection with The Vita-Food Corporation on May 5, 1941?

A. Managing director.

Q. When had The Vita-Food Corporation been organized?

A. The latter part of November in 1940.

Q. For what purpose was it organized?

A. Among other things, to develop and make and sell vitamin products.

Q. Now, Mr. Lewis, at the time of the organization of Vita-Food Corporation, were you in possession of a process whereby you could manufacture vitamin products? A. Yes.

(Testimony of Maxwell H. Lewis.)

Q. Where had you obtained that process? [577]

A. From Dr. Borsook.

Q. Is that the Dr. Borsook that testified this morning?

A. Of the California Institute of Technology, yes.

Q. Now, Mr. Lewis, when did you first meet Mr. Hanisch? A. In December of 1940.

Q. Under what circumstances?

A. I was introduced to him after four or five requests by Charles King of Pasadena.

Q. What was the nature of your discussion when you did meet him?

A. His availability and desire to make a national distribution of vitamin products.

Q. Now, Mr. Lewis, did you have anything to do personally with the creation of the name "the Stuart formula"? A. I did.

Q. Just what contribution did you make?

A. I would say most of it.

Q. Upon what basis do you lay that claim?

A. Shall I go into detail?

Q. Yes.

A. Mr. Hanisch and I had discussed and some of Mr. Hanisch's associates the names to be used for the ethical drugstore item and the grocery store item. Mr. Hanisch's principal advisor on marketing was Mr. William Pringle of Lord & Thomas. It was Mr. Pringle's urge and recommendation [578] to Mr. Hanisch that the company be called the

(Testimony of Maxwell H. Lewis.)

M. H. Lewis Company of Pasadena, and that the product be called Lewis Concentrate.

He brought a label printed to the meeting at Mr. Hanisch's house, making that his final recommendation. Theretofore I had been urging Mr. Hanisch to name the two companies after his two sons. At this meeting I again went into the situation and told him I felt very honored they would consent to name it the M. H. Lewis Company, that I felt this was going to be a very big pharmaceutical house and Mrs. Lewis and I had no children and that he had two growing boys and wanted a definite interest here in the west and that it would be best to use the companies represented by his two sons' first names.

He finally agreed that the drug item would be The Stuart Company and that the grocery store item would be the Shaler Company. We believed at that time the Shaler distribution would be the biggest, and it was named after the oldest son.

The problem then was up in the air what to do with the name Stuart. We all searched our brain as to what to do with that, to make it an attractive marketable item.

I believe I sent a list of names over at one time to Mr. Pringle's office, none of which I was particularly happy with, but they were random [579] thinking.

One night, the day before Mr. Hanisch and Dr. Borsook and myself were to go on a trip to Fort MacArthur to meet the medical director in charge—late in the night the word "formula" after Stuart

(Testimony of Maxwell H. Lewis.)

came to me. Mr. Hanisch and Dr. Borsook and I were driving possibly 10 or 15 miles from Pasadena and the discussion came up again, and I said, "Arthur, I got it." And I told him the word. He stopped the car and shook hands and said, "That is it." That was the birth of "Stuart formula."

Q. Mr. Lewis, I called your attention to the fact in the agreement of May 5, 1941, it is provided that the trade-name Stuart formula was to be and to remain the property of The Vita-Food Corporation. Will you explain to the Court why that provision was put into the contract?

A. To protect The Vita-Food Corporation and its property.

Q. Would The Vita-Food Corporation have signed that agreement unless that provision had been in it? A. Under no circumstances.

Q. Now, Mr. Lewis, did The Stuart Company ever meet its quota requirements under that contract? A. I think not.

Q. Did The Vita-Food Company waive those restrictions? A. From time to time.

Q. Why were they waived? [580]

A. On the plea of The Stuart Company that they couldn't meet them, that they felt a need of security, in having a formal waiver and in the hopes that such a waiver would encourage them to proceed and show good faith on the part of The Vita-Food Corporation.

Q. Now, Mr. Lewis, did Mr. Hanisch express any dissatisfaction to you with respect to the restrictive-

(Testimony of Maxwell H. Lewis.)

ness on The Stuart Company of the May 5, 1941, contract? A. Yes.

Q. On more than one occasion? A. Yes.

Q. In a brief sort of way tell us just what complaints he made.

A. As to the restrictions of the May 5th contract?

Q. That is right. Any complaints he had with respect to that contract.

A. In 1941, I believe, there were a very few complaints about the restrictions of the contract, except those relating to selling price. Early in the campaign of the test periods established by Mr. Hanisch, he and his advisors and I sat in on some of those discussions; felt that the spread between the cost and the selling price wasn't sufficient to sustain a campaign. My position in that respect was that if the campaign were large enough and the unit of sales and volume increased enough that the spread was sufficient. It became a [581] matter of pulling and pushing as between us and Mr. Hanisch, to induce a large volume operation. Mr. Hanisch, wishing a smaller operation and a larger unit of spread.

We yielded several times in 1941 in small price rises; I think 5 and 10 cents. I can't recall for the moment whether the larger rises in price came later, but I think they did early in 1942. I can't recall Mr. Hanisch complaining of anything of the restrictive nature as to the contract, other than that until late in '41 or the early part of '42, when he expressed a general dissatisfaction and an unhappiness about

(Testimony of Maxwell H. Lewis.)

being in the game. His expressions became more frequent and my reactions to them were that he was doing an insufficient volume job of promotion. Does that answer your question?

Q. Yes. Now, did you have any discussions with Mr. Hanisch in 1941 or 1942 relating to the ownership of the formula? A. Yes.

Q. The trade-mark? A. Yes.

Q. Will you tell the Court what those conversations were?

The Court: And what time they took place. You can add that to your question, Mr. Maiden.

The Witness: I am certain that in the late [582] spring of '42—but I can't be sure—there wasn't some restrictiveness shown in the latter part of '41. I am not certain of the spring of '42. Mr. Hanisch suggested that he be encouraged in a wider promotion program by some share in the ownership of "the Stuart formula" trade-mark.

Q. What was your reaction to that, Mr. Lewis?

A. My initial reaction was one of resentment, that Mr. Hanisch was asking to share a property he didn't own and had no right to.

Mr. Hanisch agreed to that in the discussion, but he felt that if he were going to create a large pharmaceutical house he wanted to have a share in the ownership of the trade-name.

I told him he would have to earn it. He asked in what way. I told him I thought I could recommend to the board a modification of the Vita-Food contract whereby under certain conditions of sale,

(Testimony of Maxwell H. Lewis.)

over a specified period of time, he could get a 50 per cent undivided ownership in the trade-mark, but that he had to sustain his quota sales to keep it. That was, I think, one of the final drafts of a modification contract, and it was unsatisfactory to Mr. Hanisch.

Q. You mean following this conversation with Mr. Hanisch you drew up a proposed reversion of the May 5, 1941, contract?

A. I believe we drew up quite a number of [583] them.

Q. I hand you here a document that is entitled, "Agreement." It is dated the 10th day of August, 1942, and to run between The Vita-Food Corporation and The Stuart Company. I will ask you if that is one of the proposed revisions of the May 5th contract? A. I believe it is.

Q. Who drafted that agreement?

A. Without going through it entirely, I believe we did, The Vita-Food Corporation.

Q. Was that agreement submitted to Mr. Hanisch? A. Yes.

Q. Does this agreement say anything about The Stuart Company becoming a part owner of the formula? A. Yes, it does.

Q. Would you locate the place? A. Yes.

Q. Will you read that provision?

A. It is paragraph 8, subdivision (a) on page 8.

The Court: Just a minute, please. Was this proposed draft shown to Mr. Hanisch?

The Witness: Yes.

(Testimony of Maxwell H. Lewis.)

Mr. Maiden: He said it was.

The Court: All right.

The Witness: Shall I proceed?

The Court: Yes. [584]

The Witness (Reading):

"Any and all trade-marks, trade-names, copyrights, and labels, under which the vitamin concentrates herein specifically described are packaged, sold or distributed, and any other products manufactured by First Party which may be hereafter marked or distributed by Second Party in pursuance of this agreement and any amendments or supplements thereof, shall at all times be and remain the sole and exclusive property of First Party and the right or rights of Second Party to distribute and/or market or offer for sale such products under said trade-marks, trade names, copyrights, or labels shall continue only so long as this agreement remains in full force and effect and so long as Second Party is not in default hereunder; provided, further, however, Second Party shall be the owner of an undivided one-half interest in and to 'the Stuart formula' trade-mark, when and if its purchases for twelve consecutive calendar months reach not less than thirty thousand units per calendar month for three calendar months, or upon the bankruptcy or insolvency of Second Party, all interests of Second Party in and to said trade-

(Testimony of Maxwell H. Lewis.)

mark shall revert to First Party. Such acquisition of said interest in said trade-mark is to give Second Party additional security for its use of said trade-mark and in accordance with this agreement with regard to the required additional volume reached and maintained. Upon such acquisition of said interest said trade-mark shall remain under [585] the control of First Party for the purposes of this agreement and neither party while such ownership is joint may sell, hypothecate, transfer, assign, encumber or otherwise use or dispose of said trade-mark, or any interest therein, except in the fulfillment of this agreement. Upon or during such acquisition by Second Party the prices herein provided shall not thereby be affected nor shall Second Party be otherwise entitled to compensation therefor from First Party except that the position of Second Party may thereby be more secure. Upon the termination of this agreement for any reason, all interests in said trade-mark shall revert to First Party subject to the provisions of paragraph 8(b) hereof."

The Court: Mr. Maiden, do you want any more of this read?

Mr. Maiden: I don't think so, your Honor.

The Court: If you are going to have part of that draft in the record I shall ask you to put the whole thing in. I have always been very much concerned about having things taken out of text.

(Testimony of Maxwell H. Lewis.)

Mr. Maiden: I shall, your Honor. I shall do that. I might as well do it at this time. If the Court please, I would like to now offer in evidence as Respondent's next exhibit, the document identified.

The Clerk: W.

The Court: Do you have any objection, Mr. Mackay? [586]

Mr. Mackay: No, there is no objection.

The Court: It is received in evidence as Exhibit W.

(The document above referred to was received in evidence and marked Respondent's Exhibit W.)

Q. (By Mr. Maiden): Now, Mr. Lewis, I believe you stated that that agreement was turned over by you to Mr. Hanisch for his approval?

A. Yes.

Q. Did he accept or reject it?

A. He rejected it.

Q. Why did he reject it?

Mr. Mackay: I object to that as calling for a conclusion.

Q. (By Mr. Maiden): Did he attempt——

Mr. Mackay: Wait a minute.

The Court: Objection sustained.

Q. (By Mr. Maiden): Did Mr. Hanisch tell you at the time he rejected the agreement why he rejected it? A. Yes.

Q. What did he tell you in that respect?

(Testimony of Maxwell H. Lewis.)

A. He told me—he was reading from a list of 21 famous demands—that he demanded ownership in fee simple to a half [587] interest, without condition. And that unless he got it he would not promote widely any more than he had then the sale of the Stuart formula.

Q. Was that the only reason he gave you for rejecting the agreement? A. Yes.

The Court: What do you mean when you say he was reading from a list of 21 famous demands? What do you mean by that expression?

The Witness: Mr. Hanisch invited me to his home to discuss the contract and other things, and he had a list of 21 demands. And this, I think, was No. 8 of his demands.

The Court: I see. That is your expression.

The Witness: Yes.

The Court: Is that right?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Maiden): Now, Mr. Lewis, would you relate to the Court any conversation that you may have had with Mr. Hanisch subsequent to the time he refused to accept this reversion of the contract and relating to the contract then in existence.

A. The conversation was immediately subsequent to that eighth demand. At the same time you want that conversation?

Q. Yes. [588]

A. In substance, or, rather, in precise words

(Testimony of Maxwell H. Lewis.)

of that eighth demand by Mr. Hanisch—I am afraid I lost my temper and used profanity, and got up from my chair and advanced to where Mr. Hanisch was sitting, and he stood up.

Q. Don't repeat any profanity.

A. No, I won't. And I asked him if he wanted Naboth's vineyard, also, he didn't answer.

I told him I couldn't listen any further to his demands, that he had showed bad taste, that I didn't think there was a possibility that we could work together. That I was glad he didn't accept the other contract, because if we had gotten in bed with him, we would have been smothered or crowded out. And that I saw no reason to continue deferring the fulfillment of his quotas.

Mr. Hanisch's reply at that time was the statement, "What in hell am I doing in this business, anyway?"

Q. Don't repeat any more profanity.

A. I didn't think "hell" was profane; I am sorry. I told him that had been his expression numerous times before and I would give him the same reply, that nothing was keeping him in it, that we would like to be released from him. That he had restrained us for nearly two years on the height of a vitamin wave, and I asked him if he really did want to get out. His answer was he did.

I said, "Mr. Hanisch—" I don't think I [589] said Mr. Hanisch, I said, "Arthur, how much money have you in this now?"

And he told me that over and above investors at

(Testimony of Maxwell H. Lewis.)

that time it was between $18,000.00 and $20,000.00.

I told him I would give him a check for it and assume the responsibilities of the Stuart contract myself and take The Stuart Company. His answer was that that probably would be the happiest out of the situation.

I said, "I wish you would make up your mind quickly. Tomorrow I will call you and let's finish it."

That was the extent of that conversation, as I remember it.

Q. Did you call him the next day?

A. I did.

Q. What took place on the telephone?

A. I reached Mr. Hanisch at the Stuart office and he told me he had changed his mind, that he would not do so. I asked him why. He gave me no answer.

I said, "How are you going to handle your purchases and sales?"

He said that was his business.

I said, "It is obvious we can't work together," and I did not thereafter want to do business with him.

Q. Well, what followed that conversation?

A. I had a meeting with our Board of Directors and reported the entire situation. It was the feeling of the Board [590] that I had exhausted my usefulness in dealing with Mr. Hanisch and The Stuart Company, and they asked that Mr. Wiseman thereafter deal with him. They authorized Mr. Wiseman

(Testimony of Maxwell H. Lewis.)

to use his discretion to negotiate for a purchase of The Stuart Company or the sale of The Stuart Formula trade-name. And after that I did not have a conversation nor talk to Mr. Hanisch or see him until in Court.

Q. Now, were you aware that The Vita-Food Corporation on October 8 served a notice of recision of the contract on The Stuart Company?

A. A recision of it?

Q. I mean a cancellation.

A. Yes, I was aware of it.

Q. Did you see that notice before it went out?

A. I did.

Q. It has been observed on one or more occasions that this notice simply proposed to cancel the exclusive right——

Mr. Mackay: It is part of 15.

Mr. Maiden: Thank you.

Q. (By Mr. Maiden): ——of The Stuart Company, to sell under the trade name, "the Stuart formula." Now, if you know why, if you do, why was that notice so limited?

Mr. Mackay: I object to that, if your Honor please.

Mr. Maiden: That is a perfectly proper question. [591]

Mr. Mackay: The instrument speaks for itself.

The Court: Objection overruled. Go ahead and answer the question.

The Witness: It was so limited over my objections. Mr. Wiseman and the others felt a more

(Testimony of Maxwell H. Lewis.)

moderate course should be taken with The Stuart Company and that possibly Mr. Wiseman could succeed where I had failed to work out some method whereby sales could be increased and the quotas established.

Q. (By Mr. Maiden): Well, would you explain that a little more?

A. Mr. Wiseman advised us that to invoke the final termination clause would not have exhausted all of his efforts and dictates and he felt that we should lean over backwards and give them an opportunity to do what there was, because he felt that during the time they were not exclusive sales representatives and something might come up that might cure the entire matter.

Q. That would reinstate the contract?

A. Might reinstate the contract or other things follow. I had no such sanguine belief, but the others did believe and prevailed.

Q. Now, Mr. Lewis, state to the Court whether or not the notice from The Stuart Company served on Vita-Food and dated October 12, 1942, was agreeable to the Vita-Food Corporation? [592]

Mr. Mackay: I object to that, if your Honor please, as calling purely for a conclusion.

The Court: Read the question, please.

(The question was read.)

Mr. Mackay: I am sorry. I got off on that. I withdraw the objection.

The Witness: I am afraid——

(Testimony of Maxwell H. Lewis.)

The Court: Read the question again.

(The question was read.)

The Witness: It was agreeable to me. It wasn't satisfactory and it was disappointing to Mr. Wiseman and some of our other people. After some discussion they agreed it was the answer to the situation.

Q. (By Mr. Maiden): State whether or not you had any intention or The Vita-Food Corporation had any intention of undertaking to force The Stuart Company to purchase all of its vitamin products from Vita-Food after the cancellation of the exclusive agency.

Mr. Mackay: If your Honor please, I object. It is incompetent, irrelevant and immaterial. The contract speaks for itself. Furthermore, what they had intended, separate and apart from ourselves, the negotiations are certainly incompetent; it is not proper testimony.

Mr. Maiden: If the Court please, one of the important things in this case is whether or not there is anything [593] on earth to the claim of the Petitioner that it was actually paying money for the cancellation of this contract.

Now, quite obviously the question of whether The Vita-Food Corporation had any intention of trying to force The Stuart Company to purchase all of their vitamin products from Vita-Food after they had taken away the exclusive agency is material, bearing upon the whole question of the substance of the agreement of November 28, 1942.

(Testimony of Maxwell H. Lewis.)

Now, if the Court please——

The Court: Well, I will just say this now: Mr. Mackay, I am going to overrule your objection for this reason: It is evident from the testimony that has been given that there was something in the original contract of May 5, 1941, which was rather ambiguous, that is, but would be the obligation of The Stuart Company for the balance of ten years after the exclusive feature had been terminated.

Now, unless some issue arose to test that out we would have, on the one hand, an expression of assurance that there need not be any concern about any trouble if other products were sold, and then, on the other hand, there would be a great deal of worry about whether, if you did go ahead and act on that understanding, you would get into any trouble.

And, that was actually apparently the situation. And since the contract, I feel, was rather ambiguous, the existence of these two viewpoints, where something could happen, [594] we have heard about one of those viewpoints from Mr. Hanisch, so it seems it would be proper to hear about the other viewpoint, that of Mr. Lewis.

Now, if you do not agree with that I would like you to say so now, before I make my ruling.

Mr. Mackay: Your Honor, what I am particularly objecting to is they say, "What was your intention?" What was the intention of somebody here entirely outside of all these negotiations.

The Court: Because it is too hypothetical?

(Testimony of Maxwell H. Lewis.)

Mr. Mackay: Yes. And also because it is calling for a conclusion, what is his intention. His intention, we can determine from the agreement, the provisions of the agreement.

I think just to have a man ask him what his intention was, I don't think it is proper.

The Court: I see what you mean. Your objection is that what one party to a contract might intend to do about the contract could involve, for instance, a waiver of a provision of the contract. Intention need not necessarily reflect the terms of the contract.

Mr. Mackay: Yes.

The Court: That is the basis of your objection?

Mr. Mackay: Yes.

The Court: I didn't understand that at first. I sustain your objection. [595]

Mr. Maiden: If the Court please, I don't understand the basis of the Court's ruling and I will note an exception.

The Court: I will explain it to you, because I think this is important. If I can quickly think of a fairly comparable illustration, I will do it. I don't know whether I can or not. But let us suppose that under a contract the party has the right to terminate it upon the giving of 60 days' notice after the contract has been in existence for three years. Otherwise, the contract is to continue.

And you ask the witness, "Did you have any intention of giving that notice?"

(Testimony of Maxwell H. Lewis.)

"Well," he says, "no I had not. That intention."

Now, there you have, I would say, an illustration of intent. You have to have an expression of intent because your contract calls for an expression of intent. Therefore, it is proper to ask the witness to testify about his intention. But if you have a provision in a contract which says that one party has a right to—well, if you had a fixed provision in the contract which is susceptible of being waived, but until it is waived it is a part of the contract, and you assume, one, did they have an intention to waive it. Then you are talking about intent, apart from the terms of the contract.

Now, that is the best I can do to make that clear. We will take a recess.

(Short recess taken.) [596]

The Court: Proceed, Mr. Maiden.

Q. (By Mr. Maiden): Mr. Lewis, have you looked over Respondent's Exhibit L during the recess, which is a letter dated January 30, 1941, from you to Mr. Charley King?

A. I haven't quite completed it. I am in the process of reading it.

Q. Will you please hurry through it?

A. Yes. I have finished it.

Q. Mr. Lewis, does that letter contain the entire representations made by you to Mr. Hanisch?

Mr. Mackay: I object to that, your Honor, as calling for a conclusion of the witness.

(Testimony of Maxwell H. Lewis.)

Mr. Maiden: Calling for a conclusion? This witness knows whether or not it is a fact.

The Court: What is the letter?

Mr. Maiden: That is the letter, if the Court please, in which Mr. Lewis sets forth—that is the letter in which he makes answer to the letter from Mr. King asking certain questions of Mr. Lewis.

The Court: But your question is too broad, Mr. Maiden, I sustain the objection.

Q. (By Mr. Maiden): Mr. Lewis, did you make any representations to Mr. Hanisch at the time you were negotiating the agreement of May 5, [597] 1941, on and in behalf of Vita-Food Corporation?

A. Yes.

Q. I will hand you Exhibit 8 and ask you whether or not this letter contains those representations? A. Substantially all.

Mr. Mackay: I object; same objection.

The Court: Objection sustained.

Mr. Maiden: Your Honor, I don't understand the ruling. Would you please explain the ruling?

The Court: The letter speaks for itself, Mr. Maiden. All that could be in a person's mind in addition to what is set forth in the letter could be very broad. I think your question is too broad. If you want to develop a point there, I think you ought to do it by direct questioning.

Mr. Maiden: If the Court please——

The Court: This is a letter addressed to Mr. King and not to Mr. Hanisch.

(Testimony of Maxwell H. Lewis.)

Mr. Maiden: I know. That is true, if the Court please.

The Court: And if Mr. Lewis had made representations to be given to Mr. Hanisch through another person, and you don't have that other person here to testify, then we would possibly get some misleading testimony.

Mr. Maiden: If the Court please, I believe there is a little confusion.

The Court: The letter suggests there is a controversy [598] about nothing.

Mr. Maiden: No. Your Honor, this letter——

The Court: I believe it does. Just let me see that.

Mr. Maiden: That is before the May 5 contract was entered into. Mr. Hanisch, on his direct testimony, stated that Mr. Lewis——

The Court: The letter states, "If we are to proceed with Mr. Hanisch and his group, it is desirable that issues raised in your memo be quickly resolved to the satisfaction of all concerned, or the project abandoned."

Mr. Maiden: That is right.

The Court: The letter does refer to issues that have been raised. Whether those issues were controversial or not, we don't know. What questions are raised in the memo we don't know. This letter purports to answer some questions.

Now, it seems to me that that is all that the letter is, it is a letter to answer certain questions that are raised. If you ask this witness whether

(Testimony of Maxwell H. Lewis.)

that letter represents all the representations that he ever made to Mr. Hanisch, I don't know that the witness would really understand your question. I think it would be rather hard to cross-examine on an answer to that kind of question.

Mr. Maiden: Will the Court hear me a moment, please? A prior exhibit in the case is Exhibit K. Exhibit K is a letter addressed to Mr. Lewis by Mr. Charley King, who the record shows [599] acted as emissary between Mr. Hanisch and Mr. Lewis for the purpose of bringing them together, to enter into this business arrangement of May 5, 1941.

The Court: Yes. That may be, but also Mr. Hanisch and Mr. Lewis had some conversations in which they both participated, also about these business arrangements.

Now, is the purpose of this question to rebut some testimony of Mr. Hanisch?

Mr. Maiden: The purpose of this is to show——

The Court: Answer my question. Is it to rebut some of his testimony or isn't it?

Mr. Maiden: The purpose of it is to show what representations Mr. Lewis made to Mr. Hanisch.

The Court: All right, then. Ask him what representations he made and do it independently of any of these exhibits.

Q. (By Mr. Maiden): Mr. Lewis, in order to comply with her Honor's request, would you state to the Court all the representations that you made to Mr. Hanisch with respect to The Vita-Food

(Testimony of Maxwell H. Lewis.)

Corporation and its product and its ability to comply with a contract then under consideration with The Stuart Company?

A. It is going to take quite a lengthy statement.

Q. That is all right. I want it done, Mr. Lewis. Take your time and give it in detail.

A. I believe the representations were in several sections, [600] as the Court stated, in part in small degree, possibly modified by conversation from a list of points I submitted in writing to Mr. Hanisch through his emissary.

Q. Are those points set forth in Respondent's Exhibit L? A. Yes.

Q. Are the questions asked by Mr. Hanisch set forth in Respondent's Exhibit K? A. Yes.

Q. Go ahead, Mr. Lewis.

A. May I read this letter?

The Court: I don't know why you have given him the letter. You have a question.

Mr. Maiden: I was trying to save the Court's time, because this letter sets forth the statements Mr. Lewis made in answer to the questions asked of him.

The Court: It seems to me——

Mr. Maiden: I want him——

The Court: ——the exhibits speak for themselves, Exhibit K and Exhibit L. If you want to supplement those two exhibits you may do so by asking this witness direct questions.

Mr. Maiden: I thought I could do that, your Honor, by asking him whether he made any other

(Testimony of Maxwell H. Lewis.)

or additional representations to Mr. Hanisch than those set forth in Respondent's Exhibit L. [601]

The Court: That isn't the question which you asked him, to which objection was made and which I sustained.

Mr. Maiden: I will now make that my question.

Q. (By Mr. Maiden): Do you understand the question now, Mr. Lewis? A. Yes, I do.

Q. Will you answer it?

A. I think not. There may have been, but I don't recall them at the moment.

Q. Mr. Lewis, did you tell Mr. Hanisch this product had been developed at the laboratory of the California School of Technology?

A. I confirmed Mr. King's statement that it was revealed there.

Q. Did you tell Mr. Hanisch your product was natural and not synthetic?

A. I told him it was a natural base fortified.

Q. Did you explain to him what that meant?

A. I believe he asked questions about it at the time. But he wasn't very familiar with vitamins and nutrition at our first meeting, and I am not sure he quite understood it.

Q. Did you represent to Mr. Hanisch that you thought it was similar in every respect to Buoyant B? A. No.

Q. You did not? [602]

A. I did not; it was wholly dissimilar.

Q. Did you represent to Mr. Hanisch that your product represented a new and unusual and excep-

(Testimony of Maxwell H. Lewis.)

tional process for stabilizing vitamins A and B complex?

A. Not in those precise words. I told them we had a new process and we did stabilize the A, and B complex.

Q. Did you have a new process?

A. We did.

Q. Did you make any representation to Mr. Hanisch with respect to your financial responsibility with respect to damage in their sales of the product?

A. I don't believe that that discussion of that point came up until long after the contract was entered into.

Q. What was the occasion of it coming up and what did you tell Mr. Hanisch?

A. I don't recall the conversation.

Q. Mr. Lewis, state whether or not the responsibility the Vita-Food Corporation assumed from the losses of the bottles breaking and damage incident to that—— A. Full responsibility.

Q. Now, Mr. Hanisch—did you tell Mr. Hanisch you had perfected any tablets?

A. There was never discussion with Mr. Hanisch about tablets until the end of '41, almost a year after the contract was signed. [603]

Q. Did The Vita-Food Corporation perfect a tablet? A. Yes.

Q. When was that perfected?

A. Work on the tablet began in late '41 and was concluded in, I believe, March of '42.

(Testimony of Maxwell H. Lewis.)

Q. Was that tablet made available to The Stuart Company for sale? A. It was.

Q. Was it sold exclusively to The Stuart Company? A. The Stuart formula tablets?

Q. Yes. A. Yes, it was.

Q. Do you know what percentage of the sales of The Stuart Company from and after the perfection of The Stuart Formula tablet represented sales of the tablets rather than the liquid concentrates, approximately?

A. From the time the tablets were introduced until its termination of our relationship?

Q. Yes.

A. I would have to guess; possibly a little more than a guess. I think about 30 per cent tablet and 70 per cent syrup.

Q. Mr. Lewis, what percentage of total sales of the liquid concentrates would you say involved breakage and loss in connection with the explosions?

A. Again, I would have to approximate. I believe it was [604] less than 1 per cent of the gross sales to The Stuart Company.

Q. No such incidents happened with respect to the other sales, is that correct?

A. I mean the gross sales—it was $373,000.00 or $400,000.00. I don't believe the entire two-year period resulted in more than $400,000.00 and we refunded all claims.

Q. You say you did refund all claims?

A. Made good every claim.

(Testimony of Maxwell H. Lewis.)

Q. I believe that breakage and blowing up wouldn't apply to the tablets, is that right?

A. That is true.

Q. Those tablets were sold under the trade-name of the Stuart formula, just like the liquid?

A. Yes.

Q. Now, Mr. Lewis, what was the intention of The Vita-Food Corporation and yourself with respect to the agreement of November 28, 1942?

Mr. Mackay: Just a moment, if your Honor please, I understand the question to be what his intention was with respect to the agreement of 1942.

Mr. Maiden: That is right.

Mr. Mackay: If your Honor please, I object to that, as calling for a conclusion of the witness. He was not a party to this agreement at all. I mean he was not a party in the negotiations whatsoever. We have gone over that with people [605] who were. And we have got the contract. It is merely an opinion of his and he is not qualified to answer, in my opinion.

Mr. Maiden: If the Court please, I don't propose to be cut off on my side of the case from showing the intention of The Vita-Food Corporation in this contract. Mr. Mackay has gone at great lengths with Mr. Dunlap and Mr. Hanisch, and asked them to express their intention, what they were doing in the contract. I submit the respondent, in fairness to his case, has the same right to ask this witness that question.

(Testimony of Maxwell H. Lewis.)

Mr. Lewis, the record clearly shows, was the managing director of The Vita-Food Corporation and was the man who had all the dealings and was the man who was responsible for the negotiations of the May 5, 1941, contract, and that Mr. Lewis was the person to whom Mr. Wiseman went for instructions in respect to what he should do in these negotiations.

I submit that the question is not only proper but that it would be highly prejudicial to the government's case to exclude it.

Mr. Mackay: If your Honor please, I would like to make this observation: The record is very clear here that a vice president, Mr. Wiseman, conducted negotiations from beginning about 6:30 on November 27, 1942, up until 6:00 o'clock of the morning of the 28th, at which time the contract was [606] signed. The contract was all signed and completed and everything before the witness could ever know what was in the contract. Therefore, I strenuously object to the question; asking a layman to interpret a contract or what his intention——

Mr. Maiden: I am asking one of the parties, participant to this contract.

Mr. Mackay: What he intended after a contract was completed and handed to him——

Mr. Maiden: If Mr. Mackay is going to take that position, I am going to make a motion here and now that every expression of intent made by and on behalf of Mr. Dunlap, when he was on the

(Testimony of Maxwell H. Lewis.)

stand and Mr. Hanisch when he was on the stand, be stricken from the record.

The Court: You can't make a motion of that kind.

Mr. Maiden: I do make it, your Honor, if Mr. Mackay is going to make any such insistence of this. I don't propose to have his witnesses go on and express what their intention was and yet be foreclosed as to what my witnesses, the other parties to the contract express what their intentions were.

The Court: You can't make a motion of that kind, and you know it. The time you object to testimony is at the time the testimony is being given.

Mr. Maiden: This is a Court of Equity, your Honor please, and I would have no hesitancy in making such a motion. [607] I, of course, might not be sustained.

The Court: No, it wouldn't be sustained.

Mr. Maiden: To which I would take an exception. That I do submit, if your Honor please, the question I have asked Mr. Lewis is a proper and material question in the case. Now it is admitted here this agreement of November 28, 1942, is the vital agreement in the case.

The determination of this Court, whether this contract was the sale of a capital asset or merely the payment of money for the cancellation of a contract, is to be determined largely from the intent of the parties, and that is not controlled by the language used. It is the substance of the agreement that we are interested in, rather than the language.

(Testimony of Maxwell H. Lewis.)

The Court: Now, Vita-Food Corporation is a party to the agreement. But the agreement was signed on behalf of the corporation by Mr. Wiseman. And he was the only representative of The Vita-Food Corporation who was present at the time that this agreement was being prepared, discussed, written and executed. He is the party to the agreement. Mr. Lewis is not. Mr. Lewis is an officer of the company, but he wasn't the officer of the company who signed the agreement.

Now, the agreement, I suppose was ratified subsequently by the corporation and accepted by the corporation.

So far as the intent of those who drafted the agreement is concerned, Mr. Lewis is not competent to testify, and [608] the objection is sustained.

Mr. Maiden: In view of the Court's ruling the Respondent at this time moves that the expressions of intention testified to by the witnesses Dunlap and Hanisch be stricken from the record.

The Court: Well, Mr. Dunlap was present at the proceedings. He signed the agreement as secretary of The Stuart Company. Mr. Hanisch was present during the negotiations and drafting of the agreement, and he signed the agreement as an officer of The Stuart Company.

Mr. Dunlap and Mr. Hanisch for The Stuart Company are parties to the agreement. Your motion is denied.

Mr. Maiden: Exception noted.

Q. (By Mr. Maiden): Mr. Lewis, tell the Court

(Testimony of Maxwell H. Lewis.)

who instructed Mr. Wiseman with respect to his authority and the extent of his authority to carry on the negotiations with The Stuart Company, that is, Mr. Hanisch and Mr. Dunlap with respect to the agreement of November 28, 1942.

A. The managing director and the board of directors.

The Court: Who was the managing director?

The Witness: I am.

The Court: Who are the board of directors?

The Witness: Mr. Wiseman and myself, and Mr. Overton at that time. [609]

Q. (By Mr. Maiden): Did you discuss with Mr. Wiseman the negotiations that were being held with Mr. Dunlap and Mr. Hanisch?

A. I did.

Q. What discussion did you have with Mr. Wiseman in that respect?

Mr. Mackay: Your Honor please, I object to that. That is purely hearsay. It seems we are wasting time. I think there is no question here about——

The Court: Here is what he told Mr. Wiseman——

Mr. Maiden: I beg your pardon.

The Court: What Mr. Lewis told Mr. Wiseman would not be hearsay.

Mr. Mackay: It would be, I think. There is no dispute about Mr. Wiseman negotiating and signing the contract.

The Court: Read the question.

(The question was read.)

(Testimony of Maxwell H. Lewis.)

The Court: Will you please reframe your question, to take out any element of hearsay.

Q. (By Mr. Maiden): Mr. Lewis, did you yourself give any instructions to Mr. Wiseman relative to his negotiations with Mr. Dunlap and Mr. Hanisch? A. I did.

Mr. Mackay: I object to that as [610] self-serving.

The Court: Objection is overruled.

Mr. Mackay: It is incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Q. (By Mr. Maiden): What instructions did you give him?

A. They extended over a period of some weeks, and were broken up. They were broken up into terms following his discussion with Mr. Hanisch or Mr. Dunlap, or either of them.

The Court: That doesn't answer the question.

Q. (By Mr. Maiden): I want to know what instructions you gave him.

The Court: Are you going to answer the question?

The Witness: Yes, I am.

The Court: All right.

The Witness: I gave—I told Mr. Wiseman that his position as reported to me that he had taken in his discussion——

The Court: No. This has to do with what——

Q. (By Mr. Maiden): I want you simply to state——

(Testimony of Maxwell H. Lewis.)

The Court: Read the question.

(The record was read.)

The Court: That is the question. What instructions did you give him and the emphasis is on instructions, if any? [611]

The Witness: Not to sell the trade-mark of the Stuart formula for less than $200,000.00.

Mr. Mackay: Will you read the last answer?

(The answer was read.)

Mr. Maiden: I believe that is all, if the Court please.

Cross-Examination

By Mr. Mackay:

Q. Now, Mr. Lewis, are you an advertising man?

A. I don't understand the question.

Q. Do you know what advertising means?

A. Yes. You mean carry a sandwich board around?

The Court: You can answer the question yes or no.

The Witness: I don't understand the question, your Honor.

Mr. Mackay: O.K.

The Court: All right.

Q. (By Mr. Mackay): I understood on direct examination that you stated that you had suggested to Mr. Hanisch that he use the name of Stuart in one company and the name of Shaler in the other, because of his two sons? A. Yes.

(Testimony of Maxwell H. Lewis.)

Q. Do you know Mr. Pringle or Mr. Leesman of Lord & Thomas? [612]

A. I know Mr. Pringle rather well, but I don't recall Mr. Leesman.

Q. Isn't it a fact or didn't you know that Mr. Hanisch had consulted them with respect to selecting a name?

A. I don't know what Mr. Hanisch consulted or who.

Q. He told you at that time, didn't he? He was consulting Lord & Thomas about a name?

A. No.

Q. You never heard of it until today?

A. No, not that phrased question, I haven't. Mr. Hanisch and I discussed that repeatedly.

The Court: What do you mean "not that phrased question"? You are sticking to the question a little meticulously.

The Witness: No, your Honor. Mr. Hanisch, Mr. Pringle and I had hundreds of discussions, literally hundreds of discussions.

The Court: You mean Mr. Hanisch never said to you, "I am consulting the agency"?

The Witness: Yes. It was Mr. Pringle's partner; the agency wasn't concerned.

The Court: Reframe your question. The witness wants to be exact about that question.

Q. (By Mr. Mackay): Did Mr. Hanisch ever discuss with you the fact that he had consulted Lord & Thomas, Mr. Leesman of Lord & Thomas [643] as to choosing a name? A. No, he hadn't.

(Testimony of Maxwell H. Lewis.)

Q. He had never done it? A. No.

The Court: What do you mean by saying you had conferences with Mr. Pringle?

The Witness: Mr. Pringle was a partner of Mr. Hanisch and one of the directors on The Stuart Company with Mr. Hanisch.

The Court: He wasn't connected with Lord & Thomas?

The Witness: Yes, but that wasn't his function in this discussion.

The Court: You think he should have drawn the line between his work in Lord & Thomas and his work for the corporation, is that the idea?

The Witness: I am trying to be truthful, your Honor. I really don't understand the distinction. I can't understand what he wants. I am perfectly willing to answer any question.

Q. (By Mr. Mackay): Mr. Pringle was an officer of Lord & Thomas, wasn't he?

A. I think he was.

Q. They are advertising men, Lord & Thomas?

A. Advertising—— [614]

Q. You understand what advertising is?

A. Yes, I do.

Q. Didn't you and Mr. Hanisch and Mr. Pringle talk about the name? A. Yes.

Q. The creation of the name? A. Yes.

Q. And that was before you were coming into Pasadena, weren't you and Mr. Hanisch and Dr. Borsook, from Fort MacArthur?

(Testimony of Maxwell H. Lewis.)

A. About the Stuart Company name?

Q. Yes. A. Yes.

Q. It was pretty well agreed at that time it would be called the Stuart formula? A. Yes.

Q. Now, Mr. Lewis, I understood you to say on direct examination that the only complaint that Mr. Hanisch made about the contract of May 5, 1941, was about the quota that the Stuart Company was required to sell.

A. No. I think that was not my testimony.

Q. What complaints did he make?

A. About price?

Q. About price. A. Yes. [615]

Q. Any other complaints? A. In 1941?

Q. Yes, or early in 1942.

A. With respect to the terms of the contract?

Q. Yes.

A. I don't recall them at this moment.

Q. You don't recall them. Didn't he complain about the product being unsatisfactory?

A. No.

Q. And exploding?

A. Yes. He mentioned it.

Q. That is the complaint he made?

A. Yes. That wasn't the terms of the contract, as I understood it.

Q. You understood that by the terms of the contract you had a stable product and were to supply a stable product?

A. I don't recall the terms of the contract saying a stable product, but we certainly intended to give him one.

(Testimony of Maxwell H. Lewis.)

Q. That is what you intended? A. Yes.

Q. Now, I think you stated in the summer of 1942 that relations between you and Mr. Hanisch became rather strained and as a result of that you prepared and sent to him a proposed agreement, a modification, which is Exhibit W?

Mr. Maiden: That is Exhibit W, Mr. [616] Mackay.

Mr. Mackay: Yes.

Q. (By Mr. Mackay): And I understood you to say Mr. Hanisch invited you over to his home to discuss this proposed agreement.

A. That wasn't my testimony.

Q. Isn't it? A. No.

Q. What did you say? I don't want to misquote you.

A. The strain followed that discussion; strained relations followed that.

Q. Let's leave out the strained relations.

A. Yes.

Q. I will ask you this: I understood you to testify in the summer of 1942 you had prepared a proposed agreement modifying the agreement of May 5, 1941? A. Yes.

Q. And that Mr. Hanisch invited you over to his home or you went to his home and you had some discussions about it? A. Yes.

Q. I think you also stated that he had 21 demands at that particular time? A. Yes.

(Testimony of Maxwell H. Lewis.)

Q. Did you discuss those demands at that particular time? A. Up to No. 8. [617]

Q. Up to No. 8? A. Up to No. 8.

Q. Well, did I understand you correctly—I will withdraw that. Up to No. 8? A. Yes.

Q. Were you willing at that time to agree to all his demands up to No. 8? A. No.

Q. You weren't? A. No.

Q. Did I understand you on direct examination that the only reason why he rejected the proposed modification or agreement modifying the contract of May 5, 1941, was because of the fact he demanded an ownership in the fee.

A. That was the reason he gave me.

Q. Well, he had demanded, at least made 7 demands on you before he got to No. 8, didn't he?

A. I don't recall they were in relation to the contract or the modification of it.

Q. Weren't they in relation to the agreement of May 5, 1941?

A. Not in relation to the contract of May 5 but in relation to the entire advertising problem. He wanted a part ownership in the Vita-Food Corporation. He wanted some shares in that. Let me see what other demands there were up to No. 8. [618] He wanted a financial statement. I can't recall with certainty the other demands.

Q. Isn't it a fact that Mr. Hanisch rejected this proposed contract?

The Court: What is the revision, the exhibit?

Mr. Maiden: Exhibit W.

(Testimony of Maxwell H. Lewis.)

Mr. Mackay: Exhibit W.

Q. (By Mr. Mackay): He rejected it because of the many objections to the terms therein?

A. I don't recall him making any objection except to the fact he didn't get an outright deed to a half interest to the Stuart formula.

Q. Didn't he tell you at that time he wouldn't sign this contract if he got the deed to the formula?

A. No, he did not.

Q. He didn't? A. No.

Q. Did he mention the fact that in this proposed agreement you had cut down the 60-day period to 30-day period, in which you could cancel the agreement?

A. No. I think that he congratulated me on cutting his quotas in two. I don't recall his objection to a 30-day period. In fact, at this moment I had forgotten a—there was any distinction, if there is one. [619]

Q. I am sure you will find that in the agreement. A. I don't recall it, Mr. Mackay.

Q. Now, do you know Mr. Ellis?

A. Yes, I do.

Q. Formerly of the California Institute of Technology, I mean? A. Yes.

Q. Did he ever work for Vita-Food?

A. He did.

Q. Isn't it a fact that this product was initially developed at his home? A. It is not.

Q. Where was it developed? A. Caltech.

Q. When did you find that out first?

(Testimony of Maxwell H. Lewis.)

A. When I help with it.

Q. When did you help with it?

A. Beginning in June of 1940.

Q. Didn't I understand you to say on direct examination that you learned from Mr. King that the product has been developed in California Institute of Technology? A. You did not.

Q. Now, Mr. Lewis, I call your attention to Exhibit 8, which is the contract of May 5, 1941. I will ask you if it is not a fact that the first shipment to Mr. Hanisch of this [620] product was brewed in Ellis' kitchen and bottled in his garage?

A. No.

Q. Was it brewed in anybody's kitchen?

A. No.

Q. Where was it brewed?

A. At our plant.

Q. Where? A. In South Pasadena.

Q. Where is that plant?

A. 1913 South Fremont.

Q. When did you get the plant?

A. In the latter part of November or December of 1940.

Q. Who had occupied that before?

A. A broom factory.

Q. A broom factory? A. Yes.

Q. Do you know whether it had been operated by a dog and cat hospital?

A. It had never been operated by a dog and cat hospital.

Q. Now, didn't you state in your letter to Mr.

(Testimony of Maxwell H. Lewis.)

Charles King, Exhibit 11, that the whereabouts of your plant must not be disclosed to anyone?

A. I didn't say "must not," did I? I said, "would not." [621]

Mr. Maiden: Don't let Mr. Mackay put words in your mouth.

Mr. Mackay: I am not trying to put words in his mouth. I am trying to be fair.

Mr. Maiden: That is all we ask.

Mr. Mackay: Thank you. Let's get the letter. It is Exhibit L.

Q. (By Mr. Mackay): I am calling your attention to the third paragraph where it says "The whereabouts of the Vita-Food plant and its method of operation will not be disclosed to anyone as a preliminary to completing a sales deal or organization."

A. "Will not be disclosed." What was the question, Mr. Mackay?

Q. I say why did you put that in there?

A. That is the only answer. I can't see any reason for it.

Q. Now, Mr. Lewis, I think you stated a while ago that when Mr. Hanisch would make complaints to you about the quota requirements of the contract of May 5, 1941, that you told him that the way for him to get out of his difficulty was to increase the volume.

The Witness: Would you read the question, please?

(Testimony of Maxwell H. Lewis.)

(The question was read.)

The Witness: I substantially told him [622] that.

Q. (By Mr. Mackay): It was your desire there, of course, to build up a rather large pharmaceutical industry? A. Yes.

Q. You thought it could be done, did you, or did you? A. Yes.

Q. That was your main interest at that particular time in not modifying the quota requirements of the contract? A. No.

Q. What other reason did you have?

A. I felt I could not recommend to my group a diminishing standard of performance, when a maximum had not been attained or even attempted.

Q. You heard Dr. Borsook on the stand this morning, didn't you? A. Yes.

Q. Where he explained that the vitamins were too expensive because too much money had been spent on the promotion?

A. I didn't get his saying exactly that, Mr. Mackay.

Q. Do you agree with that?

A. Do I agree with what?

Q. Do you agree to this statement?

A. Will you read his statement?

Q. You were here and heard him testify?

A. I can't remember exactly that statement, I would [623] like to hear it.

Q. At the time you entered into the contract of

(Testimony of Maxwell H. Lewis.)

May 5, 1941, what was your main purpose in undertaking the manufacturing and distribution—just prior to this agreement of May 5, 1941, what was the main purpose you had in mind in manufacturing and distributing vitamins?

A. Just prior to May 5?

Q. Yes.

A. To put out a good product, to keep faith with Dr. Borsook and to make some money.

Q. The main purpose, of course, was to increase the nutritional standards of the communities? A. That was one of the purposes.

Q. I call your attention to Exhibit 8, in paragraph, "Whereas, second party has undertaken to make available to a large number of people vitamin food concentrates which have heretofore been unobtainable by them on account of high prices, and desires to produce such food concentrates of high standard at prices lower then heretofore offered in this country, and first and third parties are in accord with second party in the view of the desirability of accomplishing this purpose to the end that the nutritional standards now prevailing in this country may be greatly improved."

At that time you were concerned, of course, with having a product distributed to the masses at a price they [624] could pay?

A. That was one of the purposes.

Q. That was the main purpose?

A. That was one of the main purposes.

(Testimony of Maxwell H. Lewis.)

Q. Wasn't that the main purpose of Dr. Borsook?

A. Dr. Borsook wasn't a party to that contract.

Q. Didn't he enjoin upon you to live up to that desire?

Mr. Maiden: If the Court please, I believe Dr. Borsook has already testified this morning and stated he didn't have any control. I believe that is already clear in the record, and I think Mr. Mackay is just wasting time and stalling around for some purpose.

Mr. Mackay: I am not wasting time.

The Court: This is cross-examination and you know what the rules of cross-examination are.

You may proceed, Mr. Mackay.

Q. (By Mr. Mackay): I call your attention to the letter of January 20, 1941, Exhibit L, which is addressed to Charley King. You say, "Your experience with us, and the fact that Dr. Borsook has gone into our situation thoroughly, and has entrusted us with great responsibilities—both financially and ethical—should indicate the extent of our responsibilities."

Now, what did you understand by "those responsibilities" [625] entrusted to you by Dr. Borsook?

A. Those responsibilities included, in my opinion, our making the best product we could, subjecting ourselves to his over-all scientific supervision and to try to find as wide a market as we could, consistent with good sound business practices, but not an unconscionable profit.

(Testimony of Maxwell H. Lewis.)

Q. Well, it was Dr. Borsook's main purpose, wasn't it, in helping you with this product or developing it to get it into the hands of the public at a very low price?

A. At the lowest price possible.

Q. In order to increase the nutritional standards?

A. I believe that was his motivating force.

Q. Yes. Now, Mr. Lewis, did you ever reduce the sales price to the Stuart Company of the product? A. I think not.

Q. You did not? A. Except in part.

Q. You knew that the Stuart Company was not making any profit from it, didn't you?

A. No.

Q. What salary did you get from the Vita-Food Corporation? A. $600.00 a month.

Q. $600.00 a month? A. Yes. [626]

Q. Who were the stockholders?

A. At what time, Mr. Mackay?

Q. In 1941. A. '41?

Q. At the execution of the agreement.

A. In May of 1941 I believe there was Mr. Overton, Mr. Shopland, Mrs. Lewis and myself.

Q. Was any change in that ownership made up to the time of the settlement agreement, November 28? A. Yes.

Q. What was the change?

A. Well, there was a $47,000.00 additionally paid in capital on 23,000 additional shares of stock issued. And Mr. McBride became a larger stock-

(Testimony of Maxwell H. Lewis.)

holder and—let's see, I bought Mr. Wiseman's stock. I bought Mr. Overton's stock. P. A. Russell became a stockholder. I think that constituted the stockholders at the end of '42.

Q. Was your salary from the corporation $600.00 a month from May 5, 1941, to October, 1942? A. Yes.

Q. Do you have a controversy pending with the United States Government over this contract of May 5, 1941? A. No.

Q. The government has examined it?

A. I don't know of a controversy existing over the [627] May 5 contract, Mr. Mackay.

Q. Well, has the government taken any position there with respect to whether or not there was a sale, the Vita-Food Company had made a sale?

A. The sale of the trade-mark?

Q. Yes.

A. Yes, they have taken a position.

Mr. Maiden: That is the contract of November 28th; you said May 5th.

Mr. Mackay: I am sorry.

Q. (By Mr. Mackay): What position is the government taking there?

A. The government at this point has taken the position that it cannot settle its proposed assessment against the Vita-Food Corporation until the pending suit or appeal of the Stuart Company has been heard and passed on.

Q. So you are directly interested in the outcome of this suit? A. Yes.

(Testimony of Maxwell H. Lewis.)

Q. Now, are you a licensed pharmacist?

A. No, sir.

Q. Did you have a licensed pharmacist in your plant? A. No.

Q. In the laboratory?

A. In the laboratory?

Q. Yes.

A. No, not as a pharmacist. [628]

Q. Did you have one in the plant?

A. No, not as a pharmacist.

The Court: That is not the question. The question is did you have anyone in your plant who was a licensed pharmacist. That is the question.

The Witness: No.

Q. (By Mr. Mackay): Do you mean to tell this Court that during the interval between May 5, 1941, and November 28, 1941, that you manufactured—1942, I mean, you manufactured products in your plant, these products without the assistance of a licensed pharmacist? A. Yes.

Q. Didn't Mr. Hanisch complain to you about the frothing of the product? A. Yes, he did.

Q. He did that several times, did he not?

A. Yes; he did; yes, he did.

Q. He also complained to you about the bottles exploding on the shelves? A. Yes, he did.

Q. I show you a letter of July 22, 1942, from McKesson & Robbins, Incorporated, wherein 16 bottles out of 24 had blown up in their establishment. Did Mr. Hanisch complain to you [629] about that? A. Yes.

(Testimony of Maxwell H. Lewis.)

Q. And call that to your attention?

A. He did, either me or Mr. Wiseman or someone in our group.

Mr. Mackay: Do you have any objection to this?

Mr. Maiden: No objection to it. I think this has already been covered in the testimony, about the blowing up of the bottles.

The Court: It will be received in evidence as Exhibit 20.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 20.)

Q. (By Mr. Mackay): Isn't it a fact that because of the breakage and frothing of these products that you were agreeable to—that the contract referred to be amended by extending for a period of 60 days the time for performance of the specified quota requirements?

A. Yes, at Mr. Hanisch's request.

Mr. Mackay: That is all.

Redirect Examination

By Mr. Maiden:

Q. Mr. Lewis, during the time you were manufacturing your product in your plant you stated that you didn't have a licensed pharmacist in charge there or in the plant. What [630] assistance did you have and what qualifications did they have?

A. Through 1941 and '42 at all times we had the assistance of one or more persons with Ph.D.

(Testimony of Maxwell H. Lewis.)

degrees in biochemistry or bio-organic or organic chemistry.

Q. Where were they from?

A. They were from Caltech.

Mr. Maiden: That is all.

Mr. Mackay: I have one further question.

Recross-Examination

By Mr. Mackay:

Q. What are your educational background items, Mr. Lewis?

A. I completed two years of night high school. That was the extent of my formal education.

Mr. Mackay: That is all.

Mr. Maiden: That is all.

Q. (By the Court): I would like to ask Mr. Lewis a few questions. Mr. Lewis, the trade name to be used in connection with the sales through the Shaler Company is Vitaplex. Are you using that name today? A. No.

Q. You are using another name called Calplex?

A. Yes, we had to substitute Calplex for Vitaplex.

Q. Why? [631]

A. Because it was in conflict with another trade name Vitaplex.

Q. Whose trade name was that?

A. Someone in New Jersey asserted a claim. We investigated and found they were entirely right, and we abandoned it.

Q. When did that claim come up?

(Testimony of Maxwell H. Lewis.)

A. In 1941.

The Court: Mr. Mackay, I don't want to delay, but where in this contract is the reference to Vitall?

Mr. Mackay: Is that the agreement of May 5, your Honor?

The Court: Yes.

Mr. Mackay: It is on page 7, your Honor.

Q. (By the Court): The 11th paragraph in the agreement of May 5, 1941, Exhibit 8, it says, "Second party—" that is Vita-Food Corporation— "shall not directly or indirectly sell any of its products to any person, firm or corporation other than First parties—" that is the Stuart Company and the Shaler Company—"save and except the product now being marketed under the name 'Vitall' in Los Angeles County, but provided, however, that First parties shall have the right and privilege of marketing and/or distributing said Vitall outside of Los Angeles County at prices identical with those quoted by Second party in said Los Angeles County." [632]

Now, I want to ask you about Vitall. Was Vitall the same stuff that you sold to the Stuart Company to be sold under the name of Stuart formula?

A. Not quite the same.

Q. Well, was it a multivitamin formula, put up in a syrup base? A. Yes.

Q. And what was the difference, just in the unit?

A. Potency.

Q. Units of vitamins in it? A. Yes.

Q. Was its potency less or more?

A. Slightly less.

(Testimony of Maxwell H. Lewis.)

Q. While the agreement of May 5, 1941, was being operated under by the Stuart Company, did you sell them the Vitall formula to be sold by them outside of Los Angeles? A. Yes.

Q. They bought that? A. Yes.

Q. Now, when it came to terminating this agreement, under the agreement of November 28, 1942, of course, they could no longer sell or distribute anything under the name of Vitall, isn't that correct?

A. I think their right terminated before then, to sell Vitall. [633]

Q. How did that happen?

A. Their quotas were not kept up in Stuart. Notice was given and received; cancellation of the contract.

Q. There was some question, as I understand, about when this contract terminated. But when this contract did terminate Stuart Company then had no further right to sell Vitall, isn't that true?

A. Yes, that is right.

Q. Now, are you selling Vitall at the present time? A. Yes.

Q. Are you selling it outside of Los Angeles?

A. Yes, nationally.

Q. Where do you sell Vitall?

A. All over the United States.

The Court: That is all.

Mr. Mackay: That is all.

Mr. Maiden: Just a second. I have one question.

(Testimony of Maxwell H. Lewis.)

Redirect Examination

By Mr. Maiden:

Q. Mr. Lewis, can you tell the Court what percentage of the total sales made by you to The Stuart Company, under this contract were Vitall, was the Vitall product.

A. Less than 2 per cent.

Mr. Maiden: That is all, if the Court please.

Mr. Mackay: That is all. [634]

The Court: You may step down.

(Witness excused.)

Mr. Maiden: Now, if the Court please, yesterday afternoon I asked counsel—your Honor please, I overlooked one exhibit I want to put in by Mr. Lewis.

Whereupon,

MAXWELL H. LEWIS

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maiden:

Q. Mr. Lewis, would you identify this little thing I am handing you.

A. It is a label prepared for Mr. Hanisch by Lord & Thomas, as a proposed label and name for the product we were selling them, before we adopted the Stuart formula trade-mark.

(Testimony of Maxwell H. Lewis.)

Q. What does the name provide?

A. "Lewis Concentrate, made by the M. H. Lewis Company, Pasadena."

Mr. Maiden: I would like to offer this in evidence as the next exhibit.

Mr. Mackay: Let me see it.

Mr. Maiden: Yes.

Mr. Mackay: No objection. [635]

The Court: It will be received in evidence as Respondent's Exhibit X.

(The document above referred to was received in evidence and marked Respondent's Exhibit X.)

The Court: You may be excused.

(Witness excused.)

Mr. Maiden: Yesterday afternoon, if the Court please, I asked counsel for Petitioner to make available to me an opinion they received from another firm of lawyers relative to their right, that is, The Stewart Company right to make a claim to ownership of this formula.

The Court: Trade name?

Mr. Maiden: Trade name. For the same limited purpose that the Court has received in evidence the other opinion, I would like to ask this also be received in evidence. I haven't even read it. I don't know what it is.

Mr. Mackay: There is no objection.

The Court: Well, there isn't any foundation laid for it. I think you will have to call Mr. Dun-

lap to the stand and lay some foundation for the exhibit. They can't come into evidence without any evidence.

Mr. Maiden: Mr. Dunlap. [636]

Whereupon,

ROBERT H. DUNLAP

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Maiden:

Q. Mr. Dunlap, I believe on direct examination you stated that in addition to the opinion you had obtained from—what was the name of the firm?

A. Hazard & Miller.

Q. That you obtained an opinion from another firm of attorneys respecting the same question.

A. Right, I so stated.

Q. What was the name of that firm?

A. Naylor and Lassagne.

Q. Where is that firm located?

A. Of San Francisco.

Q. Will you tell the Court something about the reputation of that firm? And the type of legal work it specializes in?

A. They specialize in patent and trade-mark work. They were the patent attorneys for the Purex Company, of which Mr. Adrien Pelletier is president. Mr. Adrien Pellitier is one of the directors of The Stuart Company.

(Testimony of Robert H. Dunlap.)

Q. Did you seek the opinion from Naylor and Lassagne [637] before you did from the Miller firm?

A. Approximately the same time. I think Naylor and Lassagne's written opinion was furnished me before the opinion of Hazard & Miller, as its date shows.

Q. Now, then, did you seek the legal opinion of any other trade-mark or patent attorneys?

A. We did.

Q. What firms did you seek opinions from?

A. Lyons and Lyons.

Q. Where is that firm located?

A. Los Angeles.

Q. Did you get an opinion from them?

A. We did.

Q. When did you get the opinion from them?

A. I think a day or two before or a day or two after the Naylor and Lassagne opinion.

Q. Did you obtain an opinion from any other firm? A. No, sir.

Q. Those three would constitute the three legal firms from whom you sought advice in this matter?

A. That is correct.

Q. Were you acquainted with the firm of Naylor and Lassagne?

A. I had not had that pleasure until Mr. Pelletier mentioned the name of the firm to me. [638]

Q. Did you make any effort to determine the reliability and competency of the firm to render the opinion asked?

(Testimony of Robert H. Dunlap.)

A. I would assume if Mr. Pelletier thought they were capable, they were.

Q. You made no investigation yourself?

A. Not independently, no. I assume they have a good reputation. They impressed me as being reputable attorneys.

Q. Is this the opinion in which you state they took an opposite view from the opinion of Hazard & Miller. A. It is.

Mr. Maiden: Upon those identifications of the document I would like to have it go in evidence solely for the same limited purpose that the other opinion was in evidence.

The Court: May I see Exhibit 13, please?

The Clerk: 13?

The Court: Yes.

The Clerk: Yes, your Honor.

The Court: Did you submit to Hazard & Miller a copy of the agreement of May 5, 1941, when you asked them for your opinion?

The Witness: I did, your Honor.

The Court: Which is Exhibit 13?

The Witness: Yes, your Honor, I did.

The Court: You submitted that agreement also to the other firm of Naylor & Lassagne? [639]

The Witness: Yes, your Honor.

The Court: Now, to make this complete, do you want to offer it in evidence, Mr. Mackay, the third opinion?

Mr. Mackay: It is substantially the same as Naylor & Lassagne. They agreed with Naylor &

(Testimony of Robert H. Dunlap.)

Lassagne. If the Court wants it, I will have it available.

Mr. Maiden: Let's have it.

The Court: It is cumulative.

Mr. Maiden: I don't know whether it is cumulative or not. Mr. Mackay has insisted in interjecting in this case the opinions of lawyers. He put in one that is favorable to him. He has two others that are unfavorable.

Mr. Mackay: I have no objection to putting them in.

Mr. Maiden: I would like to have them in.

The Court: The last offer of the Respondent is received as Respondent's Exhibit Y.

(The document above referred to was received in evidence and marked Respondent's Exhibit Y.)

Mr. Dunlap: I am sorry, your Honor——

The Court: While you are looking for that, is there anything further? Are there any other witnesses?

Mr. Mackay: Are you through after that?

Mr. Maiden: Yes. The Respondent rests, if the Court please.

(Witness excused.) [640]

Mr. Mackay: I have, your Honor, two short witnesses; very short.

The Court: Well, then I think it will be well to call them at this time so we don't waste any time. You can look for the other exhibit.

Mr. Mackay: I will call Mr. Hanisch.

Whereupon,

ARTHUR HANISCH

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Mackay:

Q. Mr. Hanisch, you just heard Mr. Lewis' testimony with respect to the creation of the name of Stuart formula? A. Yes, I did.

Q. I will ask you if he suggested that that name include the name of your son Stuart in the Stuart formula?

A. That name was arrived at in a conference in which Mr. Pringle of Lord & Thomas, Mr. Lewis and I each had suggested several names. And it was arrived at at that conference. Mr. Pringle was present with me and Mr. Lewis. Now, who suggested—whose suggestion it was, I don't know. It came as a result of the discussion between the three of us.

Q. You heard Mr. Lewis testify with respect to a proposed [641] agreement modifying the agreement of May 5, 1941? A. I did.

Q. The proposed agreement having been submitted to you some time in July of 1942?

A. That is right.

(Testimony of Arthur Hanisch.)

Q. And then he came to your home and you had some discussions about it? A. Yes.

Q. Will you please tell the Court briefly what your conversation with Mr. Lewis was at that time?

A. I had gone over the thing very thoroughly and had discussed it with Mr. Dunlap prior to this meeting. And between us we had worked out—I don't recall the number of objections I had to the contract—Mr. Lewis stated very definitely it was 21. I don't recall.

I know there was an outlined list of objections to the terms of that contract. And I remember reading some of the objections, and Mr. Lewis said, "Well, we are giving you an interest in the trade-mark but the terms of the contract, revised, and offered, were still so onerous, in spite of an offer to give me an interest in the trade-mark, I still could not accept that revision.

Q. You rejected it at that time?

A. I rejected it.

Q. Mr. Lewis stated you rejected it. Wait a minute. I [642] will ask you, Mr. Hanisch, if you at your conferences of negotiations with Mr. Wiseman ever offered to purchase the Stuart formula?

A. No.

Q. You heard Mr. Wiseman state you had offered $100,000.00 for it? A. Yes.

Q. Is that correct? A. No.

Q. Did you ever make an offer to purchase the Stuart formula from Mr. Wiseman? A. No.

Mr. Mackay: I think that is all.

(Testimony of Arthur Hanisch.)

Mr. Maiden: No questions.

The Court: All right.

(Witness excused.)

Mr. Maiden: If the Court please, in view of all the time it has taken to look for that other opinion by Lyons & Lyons, I withdraw my request, it may be furnished in evidence. I don't want to take up any more time. I don't think those opinions of those lawyers are worth a dime in this case.

Mr. Dunlap: I am sorry, your Honor. I wasn't able to put my hands on it. [643]

Whereupon,

ROBERT H. DUNLAP

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Mackay:

Q. Mr. Dunlap, I think you were here in Court when Mr. Wiseman testified? A. I was.

Q. Did you hear him testify in effect that Vita-Food Corporation had offered to cancel the contract? A. I did.

Q. Did he ever offer that to you?

A. No, sir, he did not.

Q. Did he ever make that suggestion?

A. No, sir, he did not.

Q. Now, when you were in your office carrying

(Testimony of Robert H. Dunlap.)

on negotiations and began to reduce the agreement to writing, who assisted in drafting the contract?

A. Mr. Wiseman and I were working together. I would state a statement as to how I wanted it, and if he had no objection he would say, "Go ahead." And then we would come to the next paragraph. And I would make a suggestion and he would say, "No, put this one down." So I put what he had. [644]

I said, "This is going to be a draft, anyhow. We will have a chance to work out our disagreement all right. For the moment let's put this one down."

Q. Was that contract joint dictation by both of you? A. It was.

Q. You are familiar with the drafts of the contract put in the record here, are you not?

A. I am somewhat ashamed of the typewriting.

Q. Were those drafts agreeable to you?

A. The first one was not.

Q. In what respect?

A. Well, the word "sell" is used. I very carefully kept out all reference to any sale of anything.

Q. How about the second one?

A. The second one was unsatisfactory in that the mutual release, the important item, was at the end of the agreement, rather than at the beginning; the cancellation of the contract.

Q. Now, were you present with Mr. Hanisch at that time, all the time he was discussing the problems with Mr. Wiseman? A. I was.

Q. Did you hear Mr. Hanisch offer at that time

(Testimony of Robert H. Dunlap.)

or any time prior to purchase the Stuart formula?

A. He never did.

Q. For any price?

A. For any price. [645]

Q. Did you make that offer? A. I did not.

The Court: Now you are talking about the trade-mark?

Mr. Mackay: The trade-mark, yes, your Honor. Thank you. I think that is all.

Cross-Examination

By Mr. Maiden:

Q. Mr. Dunlap, what did you think the provision in the contract meant, that you were receiving a quitclaim to the Stuart formula from Vita-Food?

A. I believed we owned the trade name at that time, that The Vita-Food Corporation, by reason of its registration in Washington, that some record should be cleared on that.

Q. Well, then, you understood you were getting under that contract, the agreement of November 28, 1942, whatever right and title Vita-Food may have had in and to this Stuart formula, is that right?

A. I didn't think we were getting any title, because I didn't think they had any title.

Q. Why did you want a quitclaim then?

A. Because I wanted once and for all to divorce The Stuart Company from The Vita-Food Corporation, and The Vita-Food Corporation was asserting

(Testimony of Robert H. Dunlap.)

what I believed to be an invalid claim to a trade-mark, which was one of the things we had used [646] in our business.

Q. Well, then, you simply wanted the quitclaim then for the purpose of removing any cloud from your alleged title to the Stuart formula, is that right?

A. That is not entirely correct. The difference is so small I will accept your statement and agree with it.

Q. Now, Mr. Dunlap, just one thing further. This firm of attorneys, Lyons & Lyons, from whom you got a third opinion which disagreed with the Hazard & Miller opinion, where is that firm of attorneys located?

A. Signal Oil Building, Los Angeles, on 7th Street between Figueroa and Flower.

Q. What do you know about the reputation of that firm and the type and character of legal practice it engages in?

A. A very fine firm, one of the outstanding firms in Southern California.

Q. Do they specialize in patent and trade-mark law? A. They do.

Mr. Maiden: That is all.

Mr. Mackay: That is all.

(Witness excused.)

Mr. McGregor: Before the case is closed, your Honor, we would like to offer as an amendment to the petition another document for the purpose of—

in case the Court finds all the amounts payable under the contract of November 28, 1942, is [647] accrued, accruable expense that it will show there are losses for the fiscal year 1943, which should be carried over as operating losses under the carry-over provisions of the statute.

We would like to offer this amendment for that purpose.

Mr. Maiden: I have no objection to the amendment being filed, if the Court please.

The Court: An amendment to the petition is filed at the hearing for the case was called on January 26. This is the second amendment to the petition?

Mr. McGregor: The first one was an amended petition. This is amendment to the petition.

The Court: They are all amendments. This is your second amendment.

The Clerk: Shall I mark this second amendment?

The Court: Did you say you had no objection?

Mr. Maiden: No objection to the filing.

The Court: You may mark that second amendment. There is no objection. You may file an answer in due course. The clerk will serve a copy on you today.

The Clerk: Amendment and amendment to the petition has been marked such.

The Court: Now you have something else?

Mr. McGregor: We have the 90-day letter which we would like to put in evidence, to show that—— [648]

The Court: Is it necessary? Did you make a complete copy of your 90-day letter attached to the petition?

Mr. McGregor: There is a copy attached to the first petition.

The Court: It is not necessary for you to offer it in evidence if you have a copy.

Mr. McGregor: If that is considered in evidence, that is agreeable with us.

The Court: You want to have it regarded as in evidence?

Mr. McGregor: Yes.

The Court: All right. Well then, we can receive it. That will be the next exhibit of the Petitioner.

The Clerk: 21.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 21.)

Mr. McGregor: We would like to offer into evidence a certificate of the payments of the taxes by the collector of The Stuart Company for the years here under review.

The Court: Very well. That is received as Exhibit 22.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 22.)

Mr. McGregor: Counsel for the government has been furnished a copy of this. [649]

Mr. Maiden: No objection.

Mr. Mackay: At this time we are very happy to bring this case to a conclusion. We rest.

Mr. Maiden: I am so delighted I am almost speechless to be through.

Mr. McCloskey: If your Honor please, my name is Paul McCloskey. As your Honor knows, there is pending in the Department a tax matter in which Vita-Food Corporation is the taxpayer and in which the negotiations relative to settlement of a claimed deficiency are yet unfinished and more or less depend on the outcome of this action before your Honor.

It is easily understood that Vita-Food Corporation is very much interested in the outcome of this particular proceeding. I am the attorney of fact of record before the Department for Vita-Food Corporation.

I respectfully request leave to file a brief of a friend of the Court, on behalf of the Respondent.

The Court: Under the rules of the Court that motion may be granted. We always like to have written motions filed, Mr. McCloskey, if you will be so kind as to bring in a written motion next week, it will be granted.

Mr. McCloskey: Thank you, your Honor.

The Clerk: Let the record show that a copy of the second amendment to the petition is being served on the parties.

The Court: Will the clerk please read the dates of [650] the briefs?

The Clerk: The original brief of the Petitioner will be due on March 16th. The Respondent will reply thereto on April 16th. The Petitioner will

reply to Respondent's brief May 17th.

Mr. Maiden: If the Court please, I would like to ask permission of the Court, in view of the length and importance of this case, and also in view of the fact I am still two briefs behind from my last two trials last month, that the parties be given 60 days for opening briefs and 30 days for reply briefs.

The Court: Mr. Maiden, it is not possible for me to grant that request. I would like to, if I possibly could. If you find that it is necessary to file a motion asking the Court to receive a late brief, I shall of course, give that very careful consideration. I usually grant those motions. And then the time is extended correspondingly for the other party, when one party gets an extension of time.

Is there anything further in this proceeding?

Mr. Maiden: Nothing further from the respondent.

The Court: That concludes the trial of the case of The Stuart Company.

(Whereupon, at 5:40 o'clock p.m., Saturday, January 31, 1948, the hearing in the above-entitled matter was closed.)

Filed T.C.U.S. February 29, 1948. [651]

In the United States Court of Appeals
for the Ninth Circuit
Tax Court Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Stuart Company, by and through its attorneys, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on September 22, 1950, "* * * that there is a deficiency in excess profits tax for the fiscal year ended March 31, 1944, in the amount of $1,507.08; and that there are deficiencies in income tax, in declared value excess profits tax, and in excess profits tax for the fiscal year ended March 31, 1945, in the amounts of $10.79, $6,591.80, and $67,535.53, respectively," in respect of the federal tax liability of the petitioner, The Stuart Company. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

I.

Nature of the Controversy

The issue presented below was whether the Commissioner of Internal Revenue erred in determining that amounts paid by petitioner to The Vita-Food Corporation under an agreement dated November 28, 1942, constituted payments for the acquisition of a capital asset and should therefore be capitalized, or whether said payments were in fact made to secure a release from an onerous contract and should therefore be allowed as a deduction from petitioner's gross income as a business expense.

Petitioner on the 5th day of May, 1941, entered into a contract with The Vita-Food Corporation wherein and whereby petitioner was granted the exclusive right to sell vitamin products to be furnished by The Vita-Food Corporation. This contract was to continue for a period of 10 years. Under the terms of the contract petitioner was required to purchase all of its vitamin products from The Vita-Food Corporation. The contract specified the prices petitioner was to pay for such products, as well as the prices at which petitioner could resell them. It also provided, in paragraph 6, that The Vita-Food Corporation could terminate petitioner's exclusive right if petitioner failed during any 60-day period after November 1, 1941, to purchase a minimum number of pints of vitamin products per day. Thereafter and in the early part of 1942 controversies arose between the petitioner and The Vita-Food Corporation regarding the ful-

fillment of quota requirements and the quality of the products. These controversies continued for many months, and on the 8th day of October, 1942, The Vita-Food Corporation, by letter, advised petitioner that since petitioner had failed to meet its quotas, its "exclusive right to sell under the said contract is hereby terminated," but "in all other respects the contract remains in full force and effect."

Thereafter and on October 10, 1942, the petitioner ascertained that it could purchase superior products of the same general character at prices substantially less than those fixed in the 1941 contract.

Thereafter and on the 12th day of October, 1942, petitioner advised The Vita-Food Corporation that it would not accept the partial termination, but that if petitioner should not be able to reinstate the contract by removing the shortages in quotas within a period of 60 days, petitioner would regard the contract as terminated for all purposes. As a result of these communications, negotiations were carried on between the parties, in which threats were made by petitioner to institute legal proceedings. Petitioner's counsel commenced the preparation of a complaint against The Vita-Food Corporation for a rescision of the agreement upon the grounds of fraud and misrepresentation. On November 23, 1942, notice of rescision of the 1941 agreement was served by The Stuart Company and Arthur Hanisch upon The Vita-Food Corporation. Two days thereafter The Vita-Food Corporation instituted an action in the Superior Court against petitioner at-

tempting to enjoin it from using the trade-mark "The Stuart Formula." Petitioner then, through its attorney, immediately began to draft counter-complaints against The Vita-Food Corporation. Extensive negotiations followed, principally between the attorney for petitioner and the attorney for The Vita-Food Corporation, which resulted in a contract entitled "Agreement of Settlement of Litigation and Cancellation of Contract." Said contract was dated November 28, 1942, and effected a cancellation of the contract of May 5, 1941.

By the terms of the settlement agreement petitioner agreed to pay to The Vita-Food Corporation $75,000.00, $35,000.00 down and $4,000.00 per month for ten months, and an additional sum of $122,-700.00 payable in installments measured by 7½c per unit of vitamin products thereafter sold by petitioner, whether sold under the name of "The Stuart Formula" or not. Petitioner did make such payments as above provided.

Under the terms of the contract of settlement, The Vita-Food Corporation quitclaimed without warranty and agreed, if thereafter requested by petitioner, to assign all of its right, title and interest in and to the name "The Stuart Formula" and that if the name "The Stuart Formula" was ever to be abandoned it was to revert back to The Vita-Food Corporation. An assignment was given on the 24th day of June, 1943. The Vita-Food Corporation and Mr. Lewis, its principal officer, agreed also to transfer to petitioner 300 shares of stock of petitioner which were then owned by Mr. Lewis. Under

the terms of the contract each of the parties agreed to and did release the other from any and all liabilities of every kind, nature and description.

The Tax Court held that the $75,000.00 represented payment for the cancellation of an onerous contract and was therefore deductible by petitioner. Petitioner offered evidence which was uncontradicted with respect to the value of the trade-mark as well as the value of the 300 shares of stock of petitioner as a basis for determining what portion of the total consideration under the contract should properly be allocated to cancellation of the agreement of May 5, 1941.

The Tax Court, in accordance with its established rule of law, accepted the testimony of petitioner's witnesses with respect to the value of the stock so acquired from Mr. Lewis, but it failed and neglected to consider the uncontradicted testimony of petitioner's expert witnesses with respect to the value of the trade-mark. The uncontradicted testimony shows that the trade-mark had no value whatsoever and that it would require not more than $20,000.00 to establish a trade-mark equivalent to the trade-mark of "the Stuart Formula." The officers of petitioner testified that they did not pay, and would not have paid, in excess of that amount for the trade-mark "The Stuart Formula"; that they had under active consideration the adoption of a new trade-mark and had commenced artwork on a label for a new trade-mark; and that the quitclaim of The Vita-Food Corporation's interest in "The Stuart Formula" was inconsequential and a minor factor in-

cidental to the cancellation of the agreement of May 5, 1941. Notwithstanding this, The Tax Court determined that petitioner obligated itself to pay the full amount of $122,700.00 for the purchase of the trade-mark "The Stuart Formula."

The petitioner is aggrieved by The Tax Court's Findings of Fact and Opinion and by its Decision, in that an arbitrary determination was made by the Court that $122,700.00 was paid by petitioner for the purchase of a trade-mark, "The Stuart Formula," and of the total payment but $75,000.00 was paid to secure cancellation of the onerous contract. There is no evidence in the record to support such an allocation between capital expenditure and deductible business expense. The evidence clearly compels a finding that the total payment of $197,-700.00, or substantially all thereof, was made for the sole purpose of securing a release from an onerous contract and should therefore be allowed petitioner as a deductible business expense. The Tax Court erred in failing to so hold.

II.

Court in Which Review Is Sought

The United States Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue

The Memorandum Findings of Fact and Opinion of The Tax Court were entered on June 30, 1950, and the Decision of The Tax Court was entered on September 22, 1950. Petitioner's income tax, declared value excess profits tax and excess profits tax returns for the years ending March 31, 1943, through March 31, 1945, inclusive, were filed with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The petitioner is a California corporation with its principal place of business located at Pasadena, County of Los Angeles, State of California.

The parties hereto have not stipulated that said Decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, petitioner prays that the Findings of Fact and Opinion and the Decision of The Tax Court be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors

complained of may be reviewed and corrected by said Court.

Dated December 22, 1950.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ RICHARD N. MACKAY,

/s/ F. EDWARD LITTLE,
Attorneys for Petitioner.

Filed T.C.U.S. December 21, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the petitioner on the 21st day of December, 1950, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the Findings of Fact and Opinion and the Decision of The Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the

Petition for Review, as filed, is hereto attached and served upon you.

Dated December 22, 1950.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,
/s/ F. EDWARD LITTLE,
Attorneys for Petitioner.

Receipt of Copy acknowledged.

Filed T.C.U.S. December 22, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Comes Now the petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion, Richard N. Mackay and F. Edward Little, and hereby designates for inclusion in the record on review in the above-entitled proceeding the complete record of all of the proceedings and evidence taken before The Tax Court of the United States and all matters required by Rule 75(g) of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of the proceedings before The Tax Court.

2. Pleadings:

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

(c) Amended Petition.

(d) Answer to Amended Petition.

(e) Amendment to Petition.

(f) Answer to Amendment to Petition.

3. Memorandum Findings of Fact and Opinion promulgated June 30, 1950.

4. Decision entered September 22, 1950.

5. Official report of hearing before The Tax Court on January 28, 29, 30 and 31, 1948.

6. All exhibits.

7. Petition for Review and Notice of Filing Petition for Review.

8. This Designation of Contents of Record on Review.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

Dated December 22, 1950.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
/s/ RICHARD N. MACKAY,
/s/ F. EDWARD LITTLE,
Attorneys for Petitioner.

Receipt of Copy acknowledged.
Filed T.C.U.S. December 21, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on September 22, 1950, ordering and deciding that there are no deficiencies in income tax, in declared value excess-profits tax, or in excess profits tax for the fiscal year ended March 31, 1943; that there is a deficiency in excess profits tax for the fiscal year ended March 31, 1944, in the amount of $1,507.08; and that there are deficiencies in income tax, in declared value excess profits tax, and in excess profits tax for the fiscal year ended March 31, 1945, in the amounts of $10.79, $6,591.80, and $67,535.53, respectively.

The respondent on review, The Stuart Company, is a corporation with its principal office at 234 East Colorado Street, Pasadena 1, California. It filed its corporation income and declared value excess-profits tax returns and its corporations excess profits tax returns for the fiscal years ended March 31, 1943; March 31, 1944, and March 31, 1945, with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit, where this review is sought.

Nature of Controversy

The issue is whether certain payments made by taxpayer, The Stuart Company, during the years in question were made, either in part or in whole, to secure the cancellation of an orerous contract; or whether they were made, either in part or in whole, for the purchase of a trade-mark. The Commissioner contends that the entire payments were capital expenditures made to purchase a trade-mark and are therefore non-deductible. The taxpayer contends that the entire payments were ordinary and necessary business expenses made to secure relief for an onerous contract and are therefore deductible. The Tax Court found that the taxpayer was primarily obligated to pay $75,000 to Vita-Food under the contract of November 28, 1942, in order to secure the cancellation of an onerous contract, and that it was also primarily obligated to pay $122,700 to Vita-Food under the contract of November 28, 1942, for the purchase of the trade-mark "The Stuart Formula." The Tax Court accordingly held that $75,000 paid by the taxpayer to secure the cancellation of an onerous contract is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense, and that $12,700 which the taxpayer was obligated to pay for the purchase of a trade-mark is a capital

expenditure which is not deductible as an ordinary and necessary business expense.

/s/ THERON L. CAUDLE, C.A.R.
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.
Chief Counsel, Bureau of Internal Revenue.

Filed T.C.U.S. December 21, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: The Stuart Company, 234 East Colorado Street, Pasadena 1, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of December, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of December, 1950.

/s/ CHARLES OLIPHANT, C.A.R.
Chief Counsel, Bureal of Internal Revenue, Counsel for Petitioner on Review.

Receipt of Copy Acknowledged.
Received and Filed T.C.U.S. December 28, 1950.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: A. Calder Mackay, Esq., 728 Pacific Mutual Building, 523 West Sixth Street, Los Angeles 14, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of December, 1950, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of December, 1950.

/s/ CHARLES OLIPHANT, C.A.R.
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Receipt of Copy Acknowledged.
Filed T.C.U.S. December 28, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to wit:

The Tax Court of the United States erred:

1. In holding that the taxpayer was obligated to

pay $75,000 to Vita-Food under the contract of November 28, 1942, in order to secure the cancellation of an onerous contract and that this amount is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense.

2. In holding that the taxpayer was obligated to pay only $122,700 to Vita-Food under the contract of November 28, 1942, for the purchase of the trade-mark "The Stuart Formula" and that only this amount is a capital expenditure which is not deductible as an ordinary and necessary business expense.

3. In failing to uphold the determination of the Commissioner that the entire payments of $197,700 ($122,700 plus $75,000) were capital expenditures made to purchase a trade-mark and are therefore non-deductible.

4. In that its decision is not supported by the evidence.

5. In that its decision is contrary to law and regulations.

/s/ THERON L. CAUDLE, C.A.R.
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.
Chief Counsel, Bureau of Internal Revenue. Counsel for Petitioner on Review.

Statement of Service Attached.

Filed T.C.U.S. January 8, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF NON-DIMINUTION OF RECORD

To the Clerk of The Tax Court of the United States:

Pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure adopted by the United States Court of Appeals for the Ninth Circuit, you are hereby notified that the Commissioner of Internal Revenue, in connection with the petition for review heretofore filed by him in the above-entitled proceedings, agrees to the designation of contents of record on review filed by the taxpayer, The Stuart Company, in respect to the petition for review likewise filed by it, and, in addition to the documents called for in the latter designation, hereby designates the following for inclusion in the review record:

1. Commissioner's petition for review.
2. Notices of filing petition for review.
3. Statement of points.
4. This statement of non-diminution of record.

/s/ THERON L. CAUDLE, C.A.R.
Assistant Attorney General.

/s/ CHARLES OLIPHANT, C.A.R.
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Statement of Service attached.
Filed T.C.U.S. January 8, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

Comes Now The Stuart Company, petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion, Richard N. Mackay and F. Edward Little, and states that the points on which it intends to rely in this case are as follows:

1. The Tax Court erred in holding and deciding that $122,700.00 was paid by petitioner under the cancellation agreement of November 28, 1942, for the purchase of a trade-mark "The Stuart Formula."

2. The Tax Court erred in allocating any more than a nominal portion of the total payment of $197,700.00 made by the petitioner under the cancellation agreement of November 28, 1942, to the acquisition of any capital asset.

3. The Tax Court erred in failing and refusing to hold and decide that all of said $197,700.00 paid by petitioner under the cancellation agreement of November 28, 1942, or at least substantially all thereof, was paid by petitioner to secure cancellation of an onerous contract, and in further failing to hold the same is deductible as an ordinary and necessary business expense under Section 23(a) of the Internal Revenue Code.

4. The Tax Court erred in determining any deficiency in income tax, declared value excess profits, or excess profits tax for either the fiscal year ended March 31, 1944, or the fiscal year ended March 31, 1945.

5. The Tax Court erred in that its Findings of Fact and Opinion are not supported by, but are contrary to, the evidence, to wit, The Tax Court found and held that petitioner paid $122,700.00 for the trade-mark "The Stuart Formula," whereas the evidence established that the petitioner, as the exclusive user of said trade-mark, had experienced increasing net operating losses over a nineteen-month period aggregating $15,451.56, that said trade-mark was of no value, that petitioner regarded the trade-mark as in ill-repute, that petitioner was considering the adoption of a new trade-mark once it was freed of its contractual obligation to buy products only from The Vita-Food Corporation, that acquisition by petitioner of whatever interest The Vita-Food Corporation had in said trade-mark was an inconsequential feature of the settlement agreement, and that petitioner did not pay, and would not have paid, any but a nominal consideration for said trade-mark.

6. The Tax Court erred in that its Findings of Fact are inconsistent one with another, and its Opinion is contrary to its Findings of Fact, to wit, The Tax Court found that the stock of the petitioner was worthless on the date of the settlement agreement, November 28, 1942, but notwithstanding this finding (which was amply suported by evi-

dence) The Tax Court found and held that petitioner, which had been the exclusive licensee with the sole right to use the trade-mark "The Stuart Formula," paid the sum of $122,700.00 for whatever interest The Vita-Food Corporation had in said trade-mark, thereby apparently (and erroneously) inferring that the trade-mark had sufficient value to justify such a price, which inference is repugnant to the finding that petitioner's stock had no value on that date.

7. The Tax Court erred in disregarding and ignoring uncontradicted testimony of expert and other witnesses which established that the trade-mark "The Stuart Formula" had no value on the date of the settlement agreement, November 28, 1942, or at most a nominal value.

8. The Tax Court's Findings of Fact, Opinion and Decision are contrary to the recognized and settled rule of law, that a lump sum paid under a contract is to be allocated among the respective considerations received for such sum in accordance with the relative values of said respective considerations; and since the uncontradicted testimony in this record established that the trade-mark "The Stuart Formula" had no value or only a nominal value, The Tax Court erred as a matter of law in allocating any of the payments (or more than a nominal part) as the purchase price thereof.

9. The Tax Court's Findings of Fact, Opinion and Decision, in so far as they hold that petitioner obligated itself to purchase the trade-mark "The

Stuart Formula" in consideration of the sum of $122,700.00, are arbitrary and are based upon an erroneous interpretation of the settlement agreement of November 28, 1942, in that said agreement specifies that if petitioner should abandon said trade-mark, as was actively under consideration by petitioner, the trade-mark would become the property of The Vita-Food Corporation, but notwithstanding this the petitioner would still have been liable under said contract to pay to The Vita-Food Corporation the said sum of $122,700.00.

10. The Tax Court erred in that its Opinion and Decision are contrary to law.

Petitioner hereby designates the entire record, as certified to the Clerk of the above-entitled Court, as necessary to be printed for the consideration of the points set forth above, including this Statement of Points and Designation.

Dated January 12, 1951.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ RICHARD N. MACKAY,

/s/ F. EDWARD LITTLE,

Attorneys for Petitioner.

Acknowledgment of Service attached.

Filed T. C. U. S. January 15, 1951.

[Title of Court of Appeals and Cause.]

FURTHER DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

In addition to the matters designated by The Stuart Company for inclusion in record on review, in the "Designation of Contents of Record on Review" heretofore filed by said Stuart Company, The Stuart Company hereby designates for inclusion in said record on review the following additional documents:

1. Statement of Points and Designation of Parts of the Record to Be Printed.

2. This Further Designation of Contents of Record on Review.

Dated: January 12, 1951.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ RICHARD N. MACKAY,

/s/ F. EDWARD LITTLE,

Attorneys for Petitioner.

Acknowledgment of service attached.

Filed T.C.U.S. January 15, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 25, inclusive, constitute and are all of the original papers and proceedings, including all original exhibits, 1 thru 22, and A thru Y, admitted in evidence on file in my office as called for by the designations of record on review in the proceedings before The Tax Court of the United States entitled: "The Stuart Company, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 12473 and "Commissioner of Internal Revenue, Petitioner, v. The Stuart Company, Respondent," Docket No. 12473, and in which the petitioner and respondent in The Tax Court have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 16th day of January, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12845. United States Court of Appeals for the Ninth Circuit. The Stuart Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, vs. Commissioner of Internal Revenue, Petitioner, vs. The Stuart Company, a Corporation, Respondent. Transcript of the Record. Petitions to Review a Decision of The Tax Court of the United States.

Filed: January 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT ADOPTING "STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED"

Comes Now The Stuart Company, petitioner on review herein, by its attorneys, and hereby adopts the "Statement of Points and Designation of Parts of the Record to Be Printed," filed by it with the Clerk of The Tax Court of the United States on January 15, 1951, which is included in the record on review herein as Document No. 24, except that the designation therein of the entire record as necessary to be printed shall be deemed to be amended by the "Stipulation and Order Re Exhibits" submitted herewith, whereby the parties stipulate that the original exhibits may be excluded from the printed record.

Dated: February 19, 1951.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ RICHARD N. MACKAY,

/s/ F. EDWARD LITTLE,

Attorneys for Petitioner.

[Endorsed]: Filed February 20, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

Re Exhibits

It is hereby agreed and stipulated by counsel in the above-entitled cases that the original exhibits may be excluded from the printed record but may be referred to by the parties in brief and argument as if part of that record.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for Commissioner of Internal Revenue.

/s/ A. CALDER MACKAY,
Counsel for The Stuart Company.

So ordered February 20, 1951.

/s/ WILLIAM DENMAN,

/s/ W. E. ORR,

/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed February 20, 1951.